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CASES ARGUED AND DECIDED
IN THE
SUPREME COURT
OF
MISSISSIPPI

AT THE
OCTOBER TERM, 1915 AND MARCH TERM, 1916.

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ROBERT POWELL

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CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
OCTOBER TERM, 1915.

ELLIS v. STATE.

[69 South. 819.]

RECORDS. *Justice court. Substituted record. Effect.*

Where on appeal by a defendant to the circuit court from a conviction in a justice of the peace court, it appeared that the justice record had been lost and the defendant was tried *de novo* in the circuit court on a substituted record prepared by the district attorney over defendant's protest, without conforming to the statutory procedure for supplying lost records. In such case a conviction on appeal will be reversed.

APPEAL from the circuit court of Copiah county.

HON. J. B. HOLDEN, Judge.

From a conviction of a misdemeanor, defendant appeals.

The facts are fully stated in the opinion of the court.

Watkins & Watkins, for appellant.

The case of *Redus v. Gamble*, 85 Miss. 169, throws absolutely no light upon this controversy. It merely announces the proposition which is well settled that the filing of the appeal bond removes the case from the circuit court. The case of *Winter v. Williams*, 82 Miss. 672, deals with an entirely different subject-matter. The case of *Robinson v. Mhoon*, 68 Miss. 712, deals with an entirely different state of facts, as well as the case of *Hartsell v. Meyer*, 57 Miss. 135.

It may be that the circuit court could, at any time prior to the trial have permitted the record to be amended by signing the certificate, and that was what was done in the cases cited. We do not deny that prior to a trial a court can permit an amendment, it may be even in regard to jurisdictional matters; but we do not contend that in the absence of the certificate of the justice of the peace, the circuit court had absolutely no jurisdiction whatsoever in the premises to try or determine the case or sentence the appellant. The only jurisdiction he had was that of dismissing the appeal. After he has assumed jurisdiction, however, the appellant convicted, motion for new trial overruled, the appellant sentenced, and his case removed to this court by appeal bond, the court could not inject life into his void proceedings by permitting the certificate to be signed.

We call the attention of the court to the fact that in this case, the record has been supplemented by agreement with the attorney-general, and the certificate of the circuit clerk, page 4 of the record, shows that the justice of the peace did not actually sign the certificate until the 14th day of May, that is to say, three days after he was tried, convicted and sentenced, and three days after his appeal bond to this court had been filed in the lower court and approved. We do not deny the right of the trial court to amend proceedings, even, possibly, in jurisdictional

matters, prior to a trial. After a trial, he might amend proceedings in mere clerical matters, but the court below could not cause the proceedings to be amended so as to confer jurisdiction and have the same relate back to the beginning of the trial.

The case of *Brooks v. Snead*, 50 Miss. 416, throws absolutely no light upon this controversy, because in that case, the justice of the peace signed his certificate, and the court only held that it was unnecessary for the affiant to sign the affidavit.

The case of *Green v. Boone*, 57 Miss. 618, deals only with the right of the circuit court to cause an amendment to be made in an affidavit from the justice of the peace court, a proposition to which we fully assent.

Lamar F. Easterling, Assistant Attorney-General, for the State.

I do not think that it could be seriously contended that a circuit court has not the power to substitute the records from the justice court on proper application made therefor in a criminal case. In fact, this court has expressly so held. See *Winfield v. Jackson*, 89 Miss. 272; *Helm v. State*, 67 Miss. 571. So, therefore, the court very properly and correctly held that he had power to order a substitution of the record and that section 3173, of the Code, did not apply as this section applies solely to civil cases as can be seen from the wording thereof. I lay it down as equally true that the circuit judge, where it is shown that a case has been properly removed to his court by appeal, has ample authority by amendment to cure any technical error in the papers or proceedings so as to make the record speak the truth and conform to the facts of the case. (Secs. 1487 & 1511 of the Code.)

The truth of this case is that the state in making application to substitute the record undertook a burden not required of the state. In other words, the circuit judge would have been justifiable, if he had seen fit to do so,

and it was a matter purely within his discretion, to order the defendant to substitute the record within a reasonable time upon the penalty of having the appeal dismissed, if not substituted within a reasonable time. It does not appear that the appellant objected to the truthfulness of the copy of the record substituted but bases his whole objection upon the fact that same was not properly certified to. Of course if the original papers had been lost after they were filed in the office of the circuit clerk, the original transcript would have been lost too and of course it would not appear that it had been signed by the justice of the peace if the same was only a copy, and it was equally within the power of the court to allow the justice of the peace to perfect this error, if any, by signing and certifying to the same as of the date when the transcript was made. In the case of *Redus v. Gamble*, 85 Miss. 169, Judge TRULY, speaking for the court, says:

“The appeal bond filed by Gamble with the justice of the peace before the expiration of five days from the rendition of the judgment operated to remove the case to the circuit court.”

In the case of *Winter v. Williams*, 82 Miss. 672, this court speaking through Judge TRULY, said: “The finding of the circuit judge on the disputed question of fact on the hearing of the motion to dismiss the appeal from the justice of the peace court will not be disturbed. The approval of the justice of the peace endorsed on the appeal bond showed that it had been filed in due time. The fact that he did not write his approval on the paper until after the expiration of the five days allotted by law does not alter the legal status. If, as the circuit judge decided, the bond was tendered the justice of the peace in due time, the names of its sureties read to him, their sufficiency unquestioned, and his approval of the bond stated, this was a legal filing which he could not afterwards invalidate. It was the duty of the circuit court to

see that when the law had been substantially complied with the rights of litigants are not prejudiced by technical errors of the inferior court, whether accidentally or intentionally committed. *Robinson v. Mhoon*, 68 Miss. 712, 9 So. 887; *Swain v. Gilder*, 61 Miss. 667." *Boisseau v. Kohn*, 62 Miss. 757, 24 Cyc. 706. See authorities cited under this section, especially *Romero v. Luna*, 6 N. M. 440, 30 Pac. 855; *Sandez v. Condeleria*, 5 N. M. 400, 23 Pac. 239; *Mortenev v. Mortenev*, 2 N. M. 464.

In the case of *Brooks v. Snead*, 50 Miss. 416, this court held that the certificate of a justice of the peace that the statutory affidavit (a prerequisite for an appeal) had been made is sufficient evidence of that fact though it was not signed. See, also, *Green v. Roone*, 57 Miss. 617, 31 Cent. Digest, 1578, *et seq.*; *Gaddis v. Palmer*, 60 Miss. 758.

Counsel for appellant cites *Cawthorn's case*, 100 Miss. 834. The question decided in this case was a jurisdictional one. Judge SMITH, speaking for the court, says: "As this record contains no certified copy of the proceedings before the justice of the peace, in whose court this cause is supposed to have originated, the court below was without jurisdiction and consequently the judgment must be reversed and cause remanded."

In the above case, the Assistant Attorney-General admitted in this brief that there was not a proper certified copy of the proceedings in the record.

It is plain that the above case is not authority for the case now before the court. The case of *Rodgers v. Hattiesburg*, 99 Miss. 639, was a case where the transcript of the proceedings in the court below were certified to by the city clerk, this court having held that such clerk was not the proper party to certify to the record and of course it followed, as a matter of course, that there was no certified copy at all and the circuit court was without jurisdiction. The transcript of the record certified to by one without authority not purporting to have been signed

by the magistrate before whom the proceedings were had was a nullity on its face and failed to show the jurisdictional facts necessary to remove the case to the circuit court.

In the case of *Ruff v. Montgomery*, 83 Miss. 184, it was held that "where the record disclosed no appeal bond nor any record of the proceedings in that court, the circuit court was without jurisdiction to entertain the appeal and that therefore an appeal from the circuit court would be dismissed. However, it was further ordered that if the appellant would complete his record by *certiorari* the cause would be re-instated. Of course if the face of the record showed that the supreme court had no jurisdiction, the case could not be acted upon until the jurisdictional facts were made to appear of record.

In the case of *Ball v. Sledge*, 87 Miss. 747, Judge TRULY in dealing with this subject said: "So far as the record shows, the case was never tried or decided by the justice of the peace. There is no judgment of the justice of the peace, no bond for appeal to the circuit court, nothing to show a final determination in the court where the case was first tried." But it was further held in that case that if the appellant would perfect his appeal by *certiorari* the case would be re-instated which was afterwards done.

As the record then appeared, it was defective because it failed to show the necessary jurisdictional facts on its face but when it was made to appear that such facts existed and the record conformed to the facts, the case was re-instated and tried on its merits.

In all such questions of this kind, the sole question is whether or not, as a matter of fact, the appellate court and the supreme court had acquired jurisdiction or not. The above case cites with approval the case of *Gardner v. R. R. Co.*, 78 Miss. 640. On the question of jurisdiction in the *Gardner Case*, Judge WHITFIELD, speaking for the court, said: "There is no bond for appeal in the cir-

cuit court and no judgment of the justice of the peace—nothing to show that the case originated before a justice of the peace. If not, the circuit court had no jurisdiction and this court would have none. The mere statement of the stenographer that the case had been tried by a justice of the peace and had been appealed to the circuit court will not do. We can only dismiss the appeal. If the case was appealed to the circuit court, the bond and judgment should appear in the record. We will re-instate the case if the appellant will, by *certiorari*, complete his record.” The record was afterwards completed and the case tried upon its merits.

Counsel also relies upon the case of *Phail v. Bland*, 47 So. 666. In that case, Judge FLETCHER held that this court dismissed the appeal of its own motion because the record did not show that sections 84 and 85, of the Code of 1906, had been complied with governing appeals to the circuit court from judgments of the justice of the peace. It is said in that case that the proceedings in the justice court are not certified in the manner provided by law nor are they shown in any manner, and the circuit court was without jurisdiction. It was held, however, that if the appeal should be perfected by *certiorari*, the case would be heard upon its merits, citing the *Ruff Case*, the *Ball Case* and the *Gardner Case*. So likewise in the case of *Murphy v. Hutchinson*, 47 So. 666, Judge FLETCHER held that this court would be compelled to dismiss the appeal because the record did not show that any judgment was rendered by the justice, any appeal bond executed or certified copy of the proceedings filed in the circuit court.

In the case of *Greenwood v. Weaver*, 50 So. 98, the court merely held that the certificate of a record by a city clerk was not a compliance with section 85, of the Code of 1906, and that the court properly dismissed the appeal. To the same effect was *Allen v. State*, 53 So. 498.

The two above cases were decided expressly on the ground that a certified copy of the proceedings certified

to by the deputy clerk and not by the magistrate who tried the cases was not a compliance with section 85 of the Code of 1906.

In the case of *Green v. Boone*, 57 Miss. 618, Judge CAMPBELL, speaking for this court, held that the trial court should have allowed appellant to introduce the magistrate to amend the affidavit for appeal. It should be remembered that the affidavit in such cases was a prerequisite to the right of appeal. *Lupkin & Son v. Russlee*, 67 So. 185, 23 Cyc. 872; and authorities cited in note 48; 1 Freeman on Judgments (4th Ed.), par. 89b; note to *Malone v. Samuel*, 13 Am. Dec. 172. The cases of *Dorsey v. Peirce*, 5 How. 173, and *Hughes v. Lapice*, 5 Smedes & M. 451, are in harmony with the rule as here announced, for the reason that each of them comes within the exception or proviso.

In the case of *Richburger v. State*, reported in 90 Miss. 806, it was held that it was not error to allow the district attorney to amend the indictment by changing the name of the party injured from the Jonestown Bank to the Jonestown Bank of Jonestown. The court further stated that had objection been made there even on a motion for a new trial, the order would no doubt have been entered as it could have been done at any time in *nunc pro tunc* as of the date when the entry should have been made.

In view of the foregoing authorities, I think the court had ample power to correct the certificate by requiring the justice of the peace to attach his name thereto.

Cook, J., delivered the opinion of the court.

Appellant was convicted in the court of a justice of the peace upon a misdemeanor charge, and appealed to the circuit court. When the case was called in the circuit court, we get from the record, the district attorney informed the court that the record from the justice's court had become lost or destroyed, and this fact seems to have been

admitted by counsel for appellant. The district attorney then asked that a copy of the record be substituted for the original, and that the trial proceed upon the alleged copy. The alleged copy seems to have been prepared under the directions of the district attorney. Appellant protested against being put upon trial upon the copy, saying that he did not know whether the alleged copy offered was a true copy or not. The trial judge, after stating that "the case was tried in the lower court, and the defendant was acquainted with the charge, and ought to be sufficiently familiar with it to know whether the papers substituted here are correct," overruled appellant's objection, and this trial proceeded, resulting in a verdict of guilty and a judgment of the court imposing a fine of fifty dollars upon defendant; therefore this appeal. The trial court seems to have proceeded upon the theory that it was up to the defendant to point out where in the alleged substituted record was incorrect, and, failing to do this, it would be presumed that the record was correct.

The state did not conform to the procedure required by any of the statutes of this state, and, as we see it, appellant was tried in the circuit court without a record from the justice of the peace court. A lost record may be supplied, but this must be accomplished in the manner pointed out by the statute. The state did not ask that defendant's appeal be dismissed, but elected to try him *de novo*, and, having elected this course, it was the duty of the district attorney to conform to the statute, if he desired to substitute the lost record.

Reversed and remanded .

SCRUGGS v. McGEHEE.

[69 South. 1003.]

FRAUDS, STATUTE OF. *Tenancy from year to year. Landlord and tenant. Termination of tenancy. Notice to quit. Necessity.*

Where a tenant entered upon the rented premises in pursuance of an oral agreement and as a lessee of the landlord and executed and delivered his five annual rent notes and paid the periodical rent agreed upon for four years without question, in such case regardless of the statute of frauds, a periodical tenancy was created, and the tenant became a tenant from year to year, and a purchaser who bought the land during the last year of the term could not dispossess the tenant without giving two months' notice in writing to terminate the tenancy as required by Code 1906, section 2882.

APPEAL from the circuit court of Bolivar county.

HON. DAN BREWER, Special Judge.

Suit by James G. McGehee against William Scruggs.

From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Fontaine Jones and Green & Green, for appellant.

Marcus L. Kaufman and Mayes & Mayes, for appellee.

STEVENS, J., delivered the opinion of the court.

This is an action of unlawful entry and detainer, instituted by appellee as plaintiff against appellant for the recovery of the possession of a portion of a plantation purchased by Mr. McGehee from one Dr. J. E. Givhan. The record discloses that Doctor Givhan was the owner of the land in question in the year 1908, and that he leased

the same to William Scruggs, appellant, for a term of five years, at an annual rental of seven hundred dollars per annum; that he accepted the five promissory notes executed by appellant, each for the sum of seven hundred dollars, evidencing the consideration of such rental; that this lease was not evidenced by writing other than the said promissory notes; that in pursuance of said understanding appellant entered upon the premises in question as a tenant of Dr. Givhan, and had so occupied the land for four years, and paid four of the rent notes, when in December, 1912, Dr. Givhan sold and conveyed by general warranty deed the premises in question to appellee, James G. McGehee. The conveyance to McGehee bears date December 28, 1912, and makes no reference whatever to the occupancy or tenancy of appellant, who was then in possession, claiming the farm for the year 1913, the last year of his alleged five-year term. The fifth promissory note, covering the rent for the year 1913, was by Dr. Givhan transferred and assigned to appellee without recourse, after the execution and delivery of his deed of conveyance. After appellee was invested with the legal title under his deed, and on December 30, 1912, he served notice on appellant to vacate the premises and deliver up possession to appellee as the purchaser and owner. On failure of appellant to deliver possession, appellee instituted this action for the recovery of possession. The case was tried out in the unlawful entry and detainer court, and appealed to the circuit court, where the trial judge, a jury being waived, heard the case on pleadings and proof, and entered judgment in favor of the plaintiff and against the tenant. From this judgment, appellant appeals to this court.

On the trial of the case appellant presented a motion for a continuance, based upon the absence of Dr. J. E. Givhan and one R. S. McKnight, alleged material witnesses in his behalf, and thereupon the plaintiff admitted that the witnesses named, if present, would tes-

tify to the facts set forth in the affidavit and motion for a continuance. Mr. McGehee as a witness in his own behalf testified that he contracted to buy the land in question in November, but that the deal was not closed until December 28, 1912; that he did not know appellant had executed a promissory note for the rent of 1913, but said, "I knew that, if he remained on the property under his lease, whatever the rent would be I would get it;" that he knew appellant was claiming under a five-year lease; that Dr. Givhan, the vendor, did not exhibit any written lease, but "he simply spoke of a lease, . . . that the lease was in existence, and he sold the property subject to this five-year lease;" that "I thought he (appellant) had a five-year lease on it," and that Dr. Givhan so informed him. He testified, further, that Dr. Givhan did not deliver the promissory note in question when the deed was delivered, but did afterwards mail him the note, with the indorsement thereon, and this note, which was exhibited by plaintiff on the trial of the suit, was read, and is as follows:

"Gunnison, Miss., 12/3/1908.

"\$700.00. On the 1st November, 1913, I promise to pay Dr. J. E. Givhan seven hundred dollars for rent during the year 1913 of one hundred and forty acres of land more or less. Said land is situated in the state of Miss., Bolivar county, and on Dr. J. E. Givhan's plantation on Bogue Phalia, lying on the west side of Bogue and located on east half of northwest quarter 23—24—7, and on the northeast quarter of 23—24—7. This note draws ten per cent int. per annum. after maturity.

"[Signed]

WILL SCRUGGS,"

Indorsed on the back as follows:

"For value received I transfer the within note to Jim G. McGehee without recourse on me.

"[Signed]

J. E. GIVHAN."

The note seems never to have been delivered up to the tenant, or even tendered him. The written application

for continuance recites, among other things, that if Dr. Givhan were present he would testify that:

"He had rented the land in controversy to defendant for a term of five years, and had taken defendant's five notes, one for each year, in consideration of such rental, each for the sum of seven hundred dollars, which notes were transferred to said plaintiff, as such purchaser, with the understanding between said Givhan and plaintiff at the time of such transfer that defendant was to hold possession of said land for said term of five years."

It seems from the briefs of counsel on both sides that the decision of the lower court was based upon the proposition and holding of the trial judge that the lease in question was within the statute of frauds and void, and that the possession of appellant thereunder was not protected. It is contended, among other points, by counsel for appellant, that the note in question sufficiently described the land and stated the material terms of the agreement, and that this note, coupled with the indorsement or signature of J. E. Givhan in assigning the note to appellee, constituted a sufficient memorandum; that, regardless of the question whether the lease contract is valid or invalid as between the original parties, appellee, having purchased subject to the unexpired lease, and with full understanding of the claim and rights of appellant, ratified the contract between Dr. Givhan and appellant, and thereby accepted appellant as his tenant for the balance of the term. It is further contended by appellant that appellee is in no position to complain; the original parties having elected to keep faith one with the other and to perform the invalid oral lease, and appellee purchasing with full knowledge of the facts. The proceedings were instituted before the justice of the peace January 31, 1913.

There is one question which is controlling in this case and is decisive of this appeal. Conceding for the present that the agreement between Dr. Givhan and appellant is

within the statute of frauds, yet the record shows conclusively that appellant entered upon the premises in pursuance of the oral agreement and as a lessee of Dr. Givhan; that he executed and delivered his five annual rent notes and paid the periodical rent agreed upon for four years without question, and such being the case a periodical tenancy was created, and appellant became a tenant from year to year.

"Where a lessee enters into possession under an invalid lease and pays a periodical rent, a periodical tenancy is created, as a general rule. . . . The provision of the statute that a lease not complying with the statute shall be 'void' is sufficiently complied with by holding the lease invalid as creating a tenancy for years, and will not prevent a periodical tenancy from arising by entry and payment of rent thereunder." A. & E. Ency. of Law (2d Ed.), vol. 18, pp. 194, 195, and authorities cited in the notes.

"As a general rule, a parol lease of lands for years is construed as creating only a tenancy at will, unless under the saving clause of the statute of frauds it may be good for a year. Such tenancy, however, will be subsequently changed into a tenancy from year to year, by payment and acceptance of the rent annually, and by other circumstances indicating that to be the intention of the parties, so that the almost universal rule at present is that a parol lease for years, under which possession is taken and rent paid, creates a tenancy from year to year." Cyc. vol. 24, p. 1030.

"The most frequent case of tenancy from year to year is that of a holding under a lease which fails to comply with the statute of frauds; the tenancy at will, which would otherwise exist in such case, becoming a tenancy from year to year by reason of the payment of an annual rent." Tiffany on Landlord and Tenant, vol. 1, p. 128.

Mr. Tiffany asserts this to be the universal rule, except where a statute provides otherwise, calling attention, for

instance, to the statutory provisions in Maine and Massachusetts providing that an oral lease shall create a tenancy at will only. It has been repeatedly declared by the courts that statutes of frauds were never designed as instruments of oppression. The lessee under a void parol lease has certain rights which the courts should not sweep away.

The tenancy in the instant case being, therefore, one from year to year, our statute (section 2882, Code 1906) requires two months' notice in writing to be given to terminate such tenancy. The record affirmatively shows in this case that no such notice was given, and appellant therefore held over in the year 1913 as a lawful tenant for that year, and could not be dispossessed either by the original vendor or the vendee of the premises, in the absence of such legal notice. The statute requiring two months' notice is a righteous provision of the law, intended to afford the tenant time, under just such circumstances as are disclosed by this record, to change his plans and to make other needed arrangements for himself, his family, and his possessions. A contrary holding would authorize an unscrupulous landowner to turn a helpless tenant out of doors in the middle of a crop year, and place a premium upon fraud and oppression.

The record affirmatively shows that appellee had no right to the immediate possession of the premises in question at the time he instituted this action, and, this being true, the judgment of the court below should be reversed, and the cause dismissed. We decide no other question in the case.

Reversed and dismissed.

UNITED STATES FIDELITY & GUARANTY CO. v. STATE, TO USE
OF CASSELL.

[69 South. 1007.]

1. EXECUTORS AND ADMINISTRATORS. *Settlement of estates. Courts. Jurisdiction. Parties aggrieved. Construction. Power of executor and court.*

A chancellor may, in vacation, approve an executor's final account under the authority conferred by Code 1906, section 507, providing that in matters testamentary, the chancellor may do in vacation all things that may be done in term time, but all laws governing the action of the chancery court and the process and procedure therein shall apply when the chancellor acts in vacation; where the final account contains the requisites prescribed by section 2124 and where the verified written statement prescribed by section 2125 was filed with the account and where the account remained on file subject to the inspection of any person interested, and where summons was issued and executed as provided in section 2126.

2. EXECUTORS AND ADMINISTRATORS. *Settlement of accounts. Jurisdiction.*

While it is technically true that the chancery court of one county cannot be held in another county, the action of the chancellor in approving, in vacation, an executor's final account pursuant to a summons, commanding the parties interested to appear before him in another county, did not invalidate the proceedings.

3. EXECUTORS AND ADMINISTRATORS. *Settlement of estate. Parties aggrieved.*

Where an infant beneficiary under a will received her share of the estate, and neither she nor any one acting for her complained, another beneficiary had no right to complain, the course of the procedure not defeating the purpose of the will.

4. WILLS. *Construction. Powers of executor and court.*

Under a will directing the executor to continue the testator's business for not more than three years, during which time he shall liquidate the business, only buying such goods as may be necessary for the purpose, and declaring that if during the

three years the executors or heirs shall think it best that the business shall cease, the executors or heirs may petition the court and it may determine the manner of disposing of the business, the court was authorized in its discretion to order the executor, who was unable to sell the business at public auction, to sell the same to one of the beneficiaries for herself and as guardian for an infant beneficiary.

APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Suit by the State of Mississippi for the use of Duncan G. Cassell, a minor, against the United States Fidelity & Guaranty Company. From a decree overruling a demurrer to the original bill of complaint, defendant appeals.

The facts are fully stated in the opinion of the court.

Mc Laurin, Armistead & Brien, for appellant.

Catchings & Catchinas and *Henry & Canizaro*, for appellee.

Cook, J., delivered the opinion of the court.

This appeal is prosecuted from a decree of the chancery court of Warren county overruling appellant's demurrer to the original bill of complaint filed by appellee.

A. G. Cassell, a resident of Warren county, died testate in August, 1902, and his estate was administered by the executor named in his will. The bill of complaint was filed for the purpose of having the court set aside a decree rendered by the chancellor in vacation approving the final account of the executor, and for an accounting.

It appears from the bill of complaint that A. G. Cassell, deceased, left a widow and two children, who were his sole heirs at law, as well as the beneficiaries of his will, except a few small legacies not in controversy here. Alma S. Cassell at the time her father died was about

thirteen years of age and was the child of a former marriage. Duncan G. Cassell, in whose interest this action was brought, was born after his father's death. The most important part of the testator's estate was a large and profitable drug business located in the city of Vicksburg, and the disposition of this business is the principal subject matter of this litigation. The executor was authorized to continue this business for three years, but he was admonished by the will that this business was to be liquidated during this period, and in the meantime he was to buy only such goods as was necessary for this purpose.

In March, 1905, the executor filed a petition, in which the widow, Mrs. M. D. Cassell, for herself and as next friend of her minor son, Duncan Cassell, and also Alma S. Cassell, minor, through her guardian, joined, asking that the court direct the executor to sell the drug business under the direction and on such terms as the court should prescribe. The prayer of this petition was sustained, and the court ordered the business sold at public auction to the highest bidder for cash.

In March, 1906, the executor filed a petition stating that he had advertised the drug business for sale in accordance with the order of the court but prior to the date fixed for the sale a quarantine was put in force against the city of Vicksburg, where the sale was to be made, and, believing that the business would be sold at a sacrifice, he had therefore declined to make the sale. In this petition the executor advised the court that, since the previous order of the court directing the sale of the business at public auction, Mrs. A. G. Cassell had bought the interest of the minor, Alma Cassell. The court entered a decree approving the action of the executor in not making the public sale, and further reciting that Mrs. A. G. Cassell, by permission of the court, had bought the interest of Alma S. Cassell, minor, at private sale, and that said private sale was authorized

by the terms of the will and was approved by the court. On the same date, the executor filed his final account, and the court entered a decree reciting that the account had been filed and that the executor had filed a statement under oath of the names of the heirs, devisees, and legatees. In the same order the court approved and confirmed the final account, and ordered that the account be filed and lay over as the law directs and that process issue to the parties in interest commanding them to appear before the chancellor in vacation or at the next term of the court to show cause why the final account should not be finally allowed and approved. Process was served personally on John L. Cassell, guardian of Alma S. Cassell, minor, and on the said minor, and by publication on the other parties in interest commanding them to appear before the chancery court of Warren county, in vacation, on the 21st day of May, 1906, at Woodville, Wilkinson county, Mississippi, to show cause, if any they could, why the final account of said executor should not be allowed and approved.

Going back a little, it appears from the record that in March, 1906, the chancery court of Warren county, the court in which the estate was being administered, in approving the action of the executor in regard to his omission to sell the drug business at auction, and in approving the sale of Alma's interest in the drug store to Mrs. A. G. Cassell, also directed the executor to continue the business until the approval of his final account then on file, and also decreed that after the approval of his final account in vacation the executor should turn over and deliver to Mrs. Cassell for herself, and as guardian for her infant son, Duncan G. Cassell, the entire drug business.

The first and foremost question presented for our decision is: Is the chancellor empowered by section 507, Code 1906, to approve a final account in vacation, upon process served on the parties in interest returnable to a fixed day in vacation?

It will be noted that the final account was filed in the chancery court of Warren county in March and was then approved, and it will also be noted that the account was not finally allowed and the executor discharged until May thereafter; the final account remained on file "subject to the inspection of any person interested" for more than one month from the service of the summons.

We find that section 507, Code 1906, in the broadest and most comprehensive language, confers upon the chancellor the power to do in vacation all things which he was empowered to do in term time in matters testamentary. But it is contended that section 2126, referring to final accounts especially, in equally explicit terms treats final accounts as other and ordinary suits in the chancery court, and requires that summons to interested parties must be made returnable to a regular term of the court. So it would seem that we have two statutes, one of which empowers the chancellor in a certain class of cases to do anything in vacation he is authorized to do in term time, and the other seems to provide that one of the class mentioned in the first class must be made returnable to the regular term of court. The following language is employed in section 507, viz.:

"And all laws governing the action of the chancery court in such matters, and the process and procedure therein, shall apply when the chancellor shall act. . . . in vacation."

The record shows the process and procedure indicated by sections 2124, 2125, and 2126 were observed in the instant case. The final account here contained just what section 2124 required—the written statement under oath prescribed by section 2125 was filed with this account, and the account remained on file "subject to the inspection of any person interested," and the summons was issued and executed strictly in accordance with section 2126.

There can be no doubt that the legislature empowered the chancellor to enter the decree in question, and there

is no room for doubt that all of the statutes were complied with. Sections 2124 and 2125 deal with final accounts whether returnable in term time or in vacation. Section 507 in clear and unambiguous language empowers the chancellor in vacation to allow a final account provided "all the laws governing the action of the chancery court in such matters" have been complied with. It follows that the chancellor in vacation was empowered to allow this account, and his action in doing so was perfectly valid and binding on all parties who had legal notice of his action.

The point is made by appellee that the summons issued in this case is defective and void because the parties interested were commanded "to appear before the chancery court of the county of Warren in said state in vacation, . . . at Woodville, Wilkinson county." It is argued that the chancery court of one county is not empowered to convene in another county. We do not think that this criticism of this summons is sound. Technically speaking, it is true that the chancery court of Warren county cannot be held in Wilkinson county, but it is also true that the court necessarily includes the chancellor. We believe that it would be hypercritical to invalidate the proceedings for this technical error, if error it was.

The bill of complaint also alleges that the report of the executor asking the court to confirm the sale of Alma Cassell's share of the drug business to Mrs. Cassell did not state the facts. It is alleged that the executor had in fact negotiated the sale of this interest to one Steve Platte, and that said Platte did in fact become the owner of said minor's share. It is alleged that, had the true facts been brought to the attention of the chancellor, he would not have approved the sale of Alma's share, and would not have authorized the executor to turn over the assets in his hands, and would not have entered the decree discharging him from further accounting and a decree discharging the sureties on his bond.

Neither Alma Cassell, nor any one representing her, is complaining that the money paid her for her share in the estate was paid for the purpose of vesting the title to her interest in the estate in Steve Platte instead of Mrs. Cassell; and there is nothing in the will which indicates that this course of proceeding defeated the purpose of the testator. Alma got the money, and we can see no reason why Duncan should be allowed to complain.

Finally, it is insisted that the purpose of the testator was defeated by the final decree allowing the final account of the executor to turn over the assets in his hands to Mrs. M. D. Cassell for her use and for that of her infant son, Duncan Cassell. The argument is made that the word "dispose" used in the will necessarily meant a parting with the said assets and a conversion of the same into cash or securities so that Mrs. Cassell and his children should no longer be concerned in a going mercantile business.

We here quote the language of the will referring to the property in controversy, viz:

"My executor may continue my drug business for a period of not exceeding three years, during said time he shall liquidate said business, only buying such goods as may be necessary for said purpose, and making no large or long accounts for or against said business. If during said three years, my executor or heirs shall think it best that said business shall cease, they or either of them may petition to the court and the court may determine as to the manner of disposing of said business.

"At the end of three years, my executor shall dispose of said business or stock of goods remaining unsold, as well as all accounts due said business, in manner and form as ordered by the court.

"Said executor shall present his final account within three years and six months from the date of his qualification, and shall file annual accounts."

It is our opinion that the will vests the power and discretion in the court to do what was done in this case. This testator, after providing for an auction sale to the highest bidder, then told the executor if he did not sell the property at public auction he would go to the court, and the court was authorized to determine the manner and form of disposing of the business. This was done, and the executor and his bondsmen cannot be held for the actions of the court.

There is no equity on the face of the bill, and the decree of the court overruling the demurrer is reversed, and decree will be entered here dismissing the bill.

Reversed.

HAWKINS ET AL v. SCOTTISH UNION & NATIONAL INS. CO.

[69 South. 710. 61 South. 430.]

1. **LIMITATION OF ACTIONS.** *Exceptions. Dismissal of actions. New action. Misjoinder. Dismissal. Jurisdiction. Matters of form. Duly commenced.*

Where an action duly commenced within the time allowed, is dismissed for want of jurisdiction, under Code 1906, section 3116, so providing, the plaintiff may commence a new action for the same cause, at any time within one year after such dismissal and where the commencement of the new action was more than six years after the accrual of the original cause but within one year of the time of the dismissal of the first action, a demurrer to a replication to the plea of the statute of limitations, setting up that the action was begun within one year after dismissal of the former suit should not be sustained.

2. **LIMITATION OF ACTIONS.** *Exceptions. New action.*

Code 1906, section 3116, permitting the bringing of actions within one year after dismissal of a cause for matters not affecting the merits, applies when the suit dismissed embraced the

cause of action sued on in the second, even though it also embraced other and distinct causes of action asserted against parties other than the defendant in the second suit.

3. LIMITATION OF ACTIONS. *Misjoinder. Dismissal. New action.*

Where several independent causes of action are brought in one suit in equity the court having no jurisdiction on account of such joinder, a dismissal of the cause by the court on appeal was a "dismissal for matter of form under Code 1896, section 3116, and an action brought on one of the causes so joined within one year after such dismissal was properly brought.

4. LIMITATION OF ACTION. *Exceptions. Jurisdiction. Matters of Form. Duly commenced.*

An action which was dismissed, in order to be "duly commenced" within the meaning of Code 1906, section 3116, must not necessarily have been commenced in a court having jurisdiction of the subject-matter. On the contrary, one of the designs of the statute, with which section 147 of the Constitution is in keeping, is to protect parties who have in good faith mistaken the forum in which their causes should be tried.

APPEAL from the circuit court of Forest county.

HON. P. B. JOHNSON, Judge.

Suit by G. L. Hawkins, trustee, and another, against the Scottish Union & National Insurance Company. From an order dismissing the cause, after sustaining defendant's demurrer to plaintiff's replication to the plea of the statute of limitations, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

S. E. Travis, Sullivan, Conner & Sullivan and Watkins & Watkins, for appellant.

E. J. Bowers and McLaurin & Armistead, for appellee.

SMITH, C. J., delivered the opinion of the court.

Appellee issued its fire insurance policy to Warren-Gee Lumber Company on property owned by it, to which is attached a loss payable clause in favor of G. L. Hawkins, trustee; he having a lien on the property

covered by the policy to secure the payment of certain notes held by him as trustee. This policy was issued in July, 1904; the property covered by it was destroyed by fire on December 22d, following; and this suit was instituted in the court below in February, 1913. The record contains quite a number of pleas, replications, and demurrers; but the only question submitted to us by this record is the correctness of the ruling of the court below in sustaining appellee's demurrer to appellants' replication to the plea setting up the six-year statute of limitation as a bar to the action. Appellants having declined to plead over after the sustaining of this demurrer, the cause was dismissed. This replication of appellants set up that they had within the time allowed by law commenced an action in the chancery court of Forrest county and had obtained a decree in their favor, but which upon appeal to this court was reversed, and the cause dismissed, and that the present action was commenced in one year thereafter. The statute sought to be invoked by this replication is section 3116 of the Code of 1906, which is as follows:

"If in any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form, or if, after verdict for the plaintiff, the judgment shall be arrested, or if a judgment for the plaintiff shall be reversed on appeal, the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit, or after reversal of the judgment therein; and his executor or administrator may, in case of his death, commence such new action, within the said one year."

The facts embodied in this replication and exhibits thereto are substantially the same as set forth in *Scottish Union & National Insurance Co. v. Warren-Gee Lumber Co.*, 103 Miss. 816, 60 So. 1010, and 61 So. 430, wherein

this court reversed the decree rendered in the former action instituted in the chancery court of Forrest county, hereinbefore referred to, which case must be read in connection herewith for a complete understanding of the facts upon which the ruling herein is based. An examination of the facts set forth in the former appeal herein (103 Miss. 816, 60 So. 1010) shows that the former suit was begun on an original bill on the part of a number of insurance companies, including appellee, praying that these appellants be enjoined from proceeding at law to collect, and for a decree absolving complainants from liability on the insurances therein mentioned. To this bill, Hawkins, trustee, filed an answer and cross-bill, making Warren-Gee Lumber Company a party defendant thereto, the prayer of which was that the complainant insurance companies be decreed to pay him the amount due him on the notes held by him and secured by lien upon the property covered by their policies, and that in event such decree should be denied that Warren-Gee Lumber Company be decreed to pay him the amount it was due thereon. Instead of answering the complainant's bill, the Warren-Gee Lumber Company demurred thereto, and while this demurrer was pending the bill was by complainant dismissed; and the court, upon application of Hawkins, ordered that his cross-bill be retained and proceeded with as an original bill, granting him leave to amend same within sixty days. This amendment, which was afterwards, made, consisted in the filing by Hawkins of separate bills in the same cause, one against each of the original complainant companies, to each of which he also made the Warren-Gee Lumber Company a party defendant, praying for a decree against the Warren-Gee Lumber Company for the amount due by it on the notes held by him, and against each of the companies for the amount due him under the policies issued by them. The Warren-Gee Lumber Company made its answers to these crossbills by Hawkins, trustee, cross-bills, in which Haw-

kins and each of the insurance companies were made parties defendant thereto; the prayer of each of such cross-bills being that the defendant companies therein be decreed to pay it the amount of the policies issued by them, "less the proportion or share thereof necessary to pay off and discharge the said vendor's lien or claim of said George L. Hawkins, trustee." These cross-bills filed by Warren-Gee Lumber Company contained allegations of collusion between Hawkins and the complainant companies, but prayed for no relief as to Hawkins individually, though the answer of Hawkins thereto denies that the cross-complainant was entitled to any relief against him. Whether or not such relief was asked, however, we do not regard as material reason, for the reason that such procedure was proper in a court of chancery and the defendant insurance companies were not concerned therewith.

It will be observed from this statement that in the former suit several causes of action were combined, one of which was the right of appellants to collect from appellee the amount of the insurance policy here in question; and the relief sought was that each should be decreed a proportionate part thereof or—to be more accurate—a proportionate part of the amount due by all the companies on account of the destruction of the property covered by the policies. This being true, in so far as appellee is concerned the cause of action here sued on is, within the meaning of section 3116 of the Code, the same as the one involved in the former suit. All that was sought to be recovered of appellee in the former suit was the amount due by it under its policy, and that is all that is sought to be recovered here; the only difference between the decree sought in the former suit and the judgment here sought is that in the former the court was requested to decree specifically the proportion of the amount due which should be paid to each of the appellees, while here the effort is to obtain a judgment that the entire amount be

paid to them jointly. That the statute applies when the suit dismissed embraced the cause of action sued on in the second, even though it also embraced other and distinct causes of action asserted against parties other than the defendant in the second suit, was necessarily decided in *Young v. Walker*, 70 Miss. 813, 12 So. 546, 901.

Reference in this connection is made by counsel for appellee to the fact that to several of its pleas setting up alleged breaches of various clauses of the policy by Warren-Gee Lumber Company appellant Hawkins by demurrer and replication claims that by reason of his independent contract under the loss payable clause he is not affected thereby. That issues have thus arisen between appellee and only one of appellants is not material, for they were a part of the issues involved in the former action.

The argument advanced in support of the second ground upon which it is sought to uphold the judgment of the court below is that the former action was instituted in a court not having jurisdiction of the subject-matter thereof, and consequently was not duly commenced within the meaning of the statute relied on. While the court in which the former suit was instituted should not have tried it over the protest of appellees herein, for the reason that the cause was not one of equity cognizance, still it cannot be said with accuracy that it was without jurisdiction so to do, for section 147 of our Constitution practically "sweeps away all distinction between equity and common-law jurisdiction, after it has been entertained, in a civil cause in the chancery or circuit court," so that the decree rendered by it, the chancery court of Forrest county, was valid until reversed on appeal (*Whitney v. Bank*, 71 Miss. 1009, 15 So. 33, 23 L. R. A. 531), which reversal depended on the view this court would take of a doubtful question of jurisdiction. The ground upon which the decree was reversed was that the cause was not one of equity cognizance, and since the form in which the action was brought—that is, combining a number of sep-

arate and independent causes of action in one suit—was such that no court was authorized to try it over the protest of the defendants, it was not saved by the provisions of section 147 of the Constitution. Had it not been for the form of the action, although the cause was not one of equity cognizance, the decree would either not have been reversed at all, or, if reversed, the cause would have been remanded to the court which could “best determine the controversy.” So that, when reduced to its last analysis, the dismissal of the former action was for “matter of form,” and therefore the cause comes strictly within the language of the statute.

But we do not understand that the action which was dismissed, in order to be duly commenced within the meaning of the statute, must necessarily have been commenced in a court having jurisdiction of the subject-matter. On the contrary, we think one of the designs of the statute, with which section 147 of the Constitution is in keeping, is to protect parties who have mistaken the forum in which their causes should be tried, who simply entered the temple of justice by the door on the left, when they should have entered by the door on the right. In the language of the supreme court of West Virginia, in *Tompkins v. Pacific Ins. Co.*, 53 W. Va. 484, 44 S. E. 441, 62 L. R. A. 489, 97 Am. St. Rep. 1011:

“It is a highly remedial statute and ought to be liberally construed for the accomplishment of the purpose for which it was designed, namely, to save one who has brought his suit within the time limited by law from loss of his right of action by reason of accident or inadvertence, and it would be a narrow construction of that statute to say that because, if plaintiff had, by mistake, attempted to assert his right in a court having no jurisdiction, he is not entitled to the benefit of it.”

Of course, good faith in the institution of the action dismissed is an element in determining the right to invoke the statute, and, as was said by the supreme court of the

United States in *Smith v. McNeal*, 109 U. S. 426, 3 Sup. Ct. 319, 27 L. Ed. 986:

"Cases might be supposed, perhaps, where the want of jurisdiction in the court was so clear that the bringing of a suit therein would show such gross negligence and indifference as to cut the party off from the benefit of the saving statute, as if an action of ejectment should be brought in a court of admiralty, or a bill in equity should be filed before a justice of the peace."

Statutes similar to the one here in question seem to have been enacted in most, if not all, of the states; but the only ones which have been called to our attention in which it is provided that the action must be duly commenced are those of Rhode Island and Massachusetts, and in each of these states it seems uniformly to have been held that a cause dismissed for want of jurisdiction is within the statute. It is true that in all of the cases from those states which have come under our observation the defect in jurisdiction because of which the causes were dismissed related to the parties, and not to the subject-matter. Nevertheless those cases are here in point, for a court is just as powerless to render a valid judgment when without jurisdiction of the person as it is to render such a judgment when it is without jurisdiction of the subject-matter. *Gwin v. McCarroll*, 1 Smedes & M. 351; *Wright v. Weisinger*, 5 Smedes & M. 210; *Miller v. Ewing*, 8 Smedes & M. 421.

Moreover in *Taft v. Stow*, 174 Mass. 171, 54 N. E. 506, the supreme judicial court of Massachusetts, in construing a statute similar, though not identical, with the one here in question, in that it did not require the first action to be duly commenced, held that the dismissal of an action for want of jurisdiction of the subject-matter was a dismissal for matter of form, and we do not understand counsel for appellee to, and they could not successfully, contend that an action defective only in matter of form was not duly commenced within the meaning of the stat-

nte. The true meaning of this statute is, in our judgment, as was said by SHAW, C. J., in *Coffin v. Cottle*, 16 Pick. (Mass.) 386, and quoted with approval in *Woods v. Houghton*, 1 Gray (Mass.) 580, wherein the statute under consideration was, in all respects, substantially the same as the one here in question, that:

"Where the plaintiff has been defeated by some matter not affecting the merits, some defect or informality, which he can remedy or avoid by a new process, the statute shall not prevent him from doing so, provided he follows it promptly, by suit within a year."

We have not invoked the case of *Weathersly v. Weathersly*, 31 Miss. 662, as authority for the ruling here made, for the reason, as pointed out by counsel for appellee, the statute there construed did not require that the action dismissed should have been duly commenced, and therefore it is not necessarily conclusive of the question here involved.

Reversed and remanded.

AMERICAN TRADING COMPANY v. INGRAM-DAY LUMBER
COMPANY.

[69 South. 707.]

1. SHIPPING. Demurrage. Liability. Delay in loading. Contract. Construction of charter party. Waiver by acceptance of cargo. Trial. Peremptory instructions. Consideration of evidence.

In a suit to recover demurrage paid to the master of a vessel for delay in the loading of lumber, which delay was alleged to have been caused by the wrongful acts of defendant's inspector, in refusing to accept certain lots of lumber tendered for inspection, where it did not appear that such acts delayed the loading, or that they were willful and reckless, plaintiff was not entitled to judgment.

2. *SHIPPING. Demurrage. Contract. Construction of charter party.*

Where in an action to recover demurrage paid to the master of a vessel for delay in loading lumber, it was shown that plaintiff entered into a written contract with defendant by the terms of which plaintiff was to sell and deliver to defendant a cargo of lumber "f. o. b., pier Gulfport, for November loading" and defendant requested that loading be delayed until December to which plaintiff replied, that it would be inconvenient, and that it could not agree to load in December, but afterwards received a copy of the charter party, and arranged a berth for the vessel with full knowledge of its provisions, plaintiff thereby acquiesced in the change of date and was bound by the charter party, so that it was not entitled to recover demurrage paid on account of delay in loading caused by the change.

3. *SHIPPING. Demurrage. Delay in loading. Waiver by acceptance of cargo.*

A right of action for damages for breach of contract arises on the failure of the seller to deliver the goods as agreed on for a delay in delivery. In the case of a partial delivery an action for damages will lie for the part not delivered, the acceptance of the partial deliveries being no waiver of the breach.

4. *TRIAL. Peremptory instructions. Consideration of evidence.*

The evidence of the plaintiff must be, upon its application for a peremptory instruction, taken most strongly against it.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by Ingram-Day Lumber Company, against the American Trading Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Ford & White, for appellant.

Mize & Mize, for appellee.

STEVENS, J., delivered the opinion of the court.

This action involves the question of liability between the parties hereto for one thousand four hundred and eighty-eight dollars demurrage paid by appellee to the

master of a vessel in the harbor of Gulfport. The Ingram-Day Lumber Company, appellee, a corporation engaged in the manufacture of lumber in Harrison county, Miss., entered into a written contract with the American Trading Company, a corporation engaged in the export trade, by the terms of which appellee was to sell and deliver to appellant a cargo of lumber "f. o. b. pier, Gulfport, for November loading." This contract is of date July 28, 1911. About September 13, 1911, the American Trading Company wired Ingram-Day Lumber Company stating its inability to charter a vessel for November loading, and asked that appellee extend the time of delivery until December 1st. The Ingram-Day Lumber Company replied by letter that it would be hampered by delivery of other orders in December and "preferred November loading;" that "we have all these arrangements made, and should you change the date of loading it would interfere with other loading; therefore we do not feel that we are safe in making this promise."

On September 29th thereafter the American Trading Company forwarded to appellee a copy of the charter party entered into between them and the steamship company owning the vessel *Aphrodite*, and advising that the ship would report for cargo by December 1st, and that the vessel would likely take advantage of its option of loading one thousand barrels of rosin, thereby slightly reducing the cargo of lumber. The Ingram-Day Lumber Company on October acknowledged receipt of the charter party and made no objection to the arrangement between appellant and the ship company, and offered no suggestion as to changing the time of delivery.

Prior to the arrival of the vessel, and on December 11th, the Ingram-Day Lumber Company made written application to the Gulf & Ship Island Railroad Company, owner of the wharf, for berthing the vessel and advising that the vessel would arrive about December 19th. The vessel did arrive in port December 19th, ready for load-

ing on the 20th. By custom of the harbor, and on account of inadequate wharfage facilities, ships took their turn at the pier in the order of their arrival. There was no vacant berth for the *Aphrodite* when it arrived. On account of this crowded condition of docks she was unable to come alongside of the wharf in accordance with the rules of the railway company until December 29th. At this time it so happened that the Ingram-Day Lumber Company was loading another vessel called the *Bright Wings*. Under rules of the port the *Bright Wings* was not taking on her cargo as rapidly as she should, and was ordered out of her berth to make room for the vessel having the next claim to the berth. The agent of the Ingram-Day Lumber Company thereupon went to the wharfmaster who controls the vessels and represented to said wharfmaster that his company controlled the berthing of both the *Bright Wings* and the *Aphrodite* and directed the wharfmaster to change positions of the two ships and permit the *Bright Wings* to remain at the wharf, thereby delaying the berthing of the *Aphrodite* until January 16, 1912. When the *Aphrodite* did obtain a berth, the cargo contracted for had not been delivered alongside of the ship or on the pier. It appears that the Ingram-Day Lumber Company did not, in fact, have this lumber on hand at its manufacturing plant, but was busy at that time buying the lumber from various mills, and thereby accumulating it from different sources, over land and sea. This lumber continued to be delivered in installments until after the expiration of the lay days of the ship and after demurrage began to accrue. It appears, further, that under the charter party the number of lay days was twenty-nine and from the evidence that the vessel, by loading at its maximum intake per day, could have finished loading in ten days. After the ship loaded, the Ingram-Day Lumber Company, in order to obtain a so-called certificate of inspection for the cargo and obtain clearance for the vessel, was compel-

led to pay eight days' demurrage to the master of the vessel. After getting a certificate of inspection, appellee then made sight draft upon appellant for the purchase price of the entire cargo, and thereafter demanded from appellant reimbursement of the demurrage, and upon denial of liability brought this action in the circuit court for the recovery thereof.

The facts above stated were pleaded in detail by appellant in its notice under the general issue. At the conclusion of the testimony on the trial of the case in the circuit court both parties asked for peremptory instruction. The court granted to plaintiff, appellee here, a peremptory instruction, in pursuance of which judgment was rendered for the full amount sued for.

There was considerable testimony on behalf of plaintiff to the effect that delay in the shipment of several installments of lumber was occasioned by the wrongful acts of certain inspectors of the American Trading Company in refusing to accept certain lots of lumber tendered for inspection at the mills. There is evidence to the effect that certain inspectors of the purchaser refused to accept these lots of lumber, and that thereafter other inspectors of the company reinspected the lumber offered and accepted it. There is no evidence that the refusal of the first inspectors was characterized by willfulness or recklessness, but for some reason not disclosed by the record the inspectors differed as to the grade of the lumber or on the question whether these particular lots of lumber would bear South American inspection, and this fact according to witnesses for appellee, delayed shipment on some of the lumber from the mills to Gulfport, the place of loading. The witnesses estimated this delay from six to eight days. The evidence does not show, however, that this delay in shipment checked or suspended the actual loading of the vessel. In other words, it is uncertain from the testimony whether during the particular time of this delay the vessel had ac-

cess to a sufficient quantity of lumber to keep her busy loading. The log kept by the witness Sommerville shows that, excepting Sundays and one legal holiday, the stevedore company's gangs were busy loading each of the fourteen days actually consumed in loading on and after the day the vessel actually berthed.

It is the contention of counsel for appellee that the Ingram-Day Lumber Company was not bound by the terms of the charter party, and therefore was not obligated to deliver this lumber within the lay days of the vessel. While the Ingram-Day Lumber Company was not a party to this contract between the charterer and the owners of the vessel, it manifestly appears that the company waived its right to deliver the cargo for November loading as originally stipulated for in the contract for the purchase of the lumber, and thereafter acquiesced in the plan of appellant to charter and present for loading this very vessel *Aphrodite*, and undertook to deliver the entire cargo according to the requirements of the ship. A copy of the charter party was furnished appellee, and certainly placed appellee upon notice of the intended arrival of the ship and the time within which the ship expected to load. Mr. Mitchell, secretary and general manager of appellee company, testified that he examined to some extent the charter party, saying:

"I looked at it to ascertain the demurrage; this is in one clause. I familiarized myself with those features."

Upon being asked why he familiarized himself with those features, he responded:

"Because my customer was interested in those features, and I knew it was a matter of dollars and cents to him if not complied with."

The original contract for the purchase of the lumber does not expressly provide for a delivery by installments. When appellee, therefore, undertook to deliver the lumber for this particular vessel, and long after the time stipulated for delivery in the written order it thereby obli-

gated itself as the seller to deliver the entire cargo in ample time for the vessel to begin loading at its maximum intake per day as soon as it was berthed; in other words, the notice by appellant that it had chartered a vessel to take on this particular order or cargo after the time stipulated in the original contract, together with the undertaking on the part of appellee to furnish the entire cargo for the vessel in question, operated simply to change the time of delivery from "November loading" to that time fixed by the requirements of the steamship company in its charter party. The effect of a contrary holding would be to substitute no time or an indefinite length of time for the delivery of the lumber in question, and therefore, in effect, to nullify the contract altogether. It is manifest that appellee acquiesced in the arrangement for the vessel. Appellee as early as December 11th made written application itself for berthing this particular vessel. This action was followed by its wrongful action in changing the time of berthing between the two vessels, Bright Wings and Aphrodite, and by its efforts to accumulate the cargo in question, even after the vessel came into the harbor.

It is further contended by counsel for appellee, and seems to have been the holding of the court below, that the acceptance of certain installments of this lumber after the vessel went on demurrage constitutes a waiver on the part of the time for delivery and all damages incident to delay. We do not so hold.

"A right of action for damages for breach of contract arises on the failure of the seller to deliver the goods as agreed or for a delay in delivery. In the case of a partial delivery an action for damages will lie for the part not delivered, the acceptance of the partial deliveries being no waiver of the breach." Cyc. vol. 35, p. 615.

A waiver is to be determined by the circumstances of each particular case. In this instance a refusal to accept the last installments might have resulted in the ship

being supplied with less than its cargo stipulated for in the charter party, and probably would have necessitated payment of much greater damages by appellant to the owners of the vessel. Counsel for appellee concede that this vessel could have been loaded without demurrage if, as they say, the inspectors had not rejected the lumber they should have accepted, and thereby caused a delay in the loading of the vessel of at least ten days. It necessarily follows, therefore, that if the delay in inspection was not the fault of appellant, or did not, in fact, delay the actual work of loading, the demurrage was occasioned by the negligence or delay in shipment by appellee. This demurrage has already been paid by appellee, and, if occasioned by its own negligence, it follows that there is no cause of action for the recovery of or claim for reimbursement for this demurrage. But, conceding that appellee, at the time the first inspectors of appellant declined to accept certain lots of lumber tendered, was in default or had breached its contract, it yet remains that appellant was under the duty of co-operating with appellee in preventing the ship going on demurrage or or keeping the actual demurrage, if any, at a minimum. The fact that appellant, through its inspectors, accepted certain lumber which its inspectors had previously declined to accept, places this company to that extent in fault, and if this prevented the ship from taking on her cargo at her maximum intake per day, then appellant would be cast in the attitude of causing, by the negligence of its inspectors, at least a part of the very demurrage for which, under the provisions of the charter party, it was liable. It will be remembered that this is not a contest over the dispatch money provided for by the charter party. It is to be remembered further that the written order calls for "November loading" and for "one steamer cargo pitch pine, 2,000/2,250 M. ft. (ten per cent. more or less to suit capacity of vessel) long leaf sound and square edge, dry and bright, assorted as follows," etc.

The letter of appellant in forwarding the charter party refers to this particular order, saying:

"Aphrodite R. P. 6785. We inclose charter party covering this steamer, which we estimate will report about the 1st part of December for cargo," etc.

In response appellee writes:

"We have your favor of the 29th inclosing charter party for your order No. 6785 steamship Aphrodite."

The actions of the parties thereafter show that appellee understood the cargo was to be loaded. While the stevedore company had the contract to do the loading and was paid by appellant, it yet remains that appellee contracted to deliver a "steamer cargo" in time to be loaded in November. This is followed by the action of appellee in making application for the berthing of the vessel and in undertaking to control the berthing. When the cargo is finally aboard, the bill of lading and inspection certificate designate appellee as the shipper of the cargo "for account of American Trading Company," and on the faith and verity of these documents appellee drew sight draft for the purchase price. The original contract, therefore, must be interpreted in connection with the correspondence of the parties and the construction which they by their conduct have placed upon it. It appears to us that the real undertaking of appellee was to furnish this particular vessel with a sufficient cargo of lumber according to the specification and assortment provided for in the written order; in fact, it was the shipper of the cargo for the account of appellant. The evidence shows that appellee had the right to control the bill of lading until it received its money.

The evidence of the plaintiff must be, upon its application for a peremptory instruction, taken most strongly against it; and, according to the estimate of plaintiff's witnesses, the delay complained of on account of inspection would not consume the entire eight days' demurrage. Furthermore, even though appellant did not at-

tempt to excuse the action of its inspectors in first declining certain of the lumber tendered, the question whether the delay in inspection actually suspended the work of loading, or whether it caused the ship to take on a minimum instead of a maximum intake per day, are questions, upon the whole record, involved in great doubt and uncertainty. The principle of law really invoked by both parties to this appeal is well stated by Mr. Elliott in his work on Contracts (volume 3, § 2151):

“The principle is firmly settled that the party injured by the breach of a contract can recover only such damages as by reasonable exertion and expense he could not prevent. . . . The law, for wise reasons, imposes upon a party subjected to injury from a breach of contract the active duty of making a reasonable exertion to render the injury as light as possible. Public interest and sound morality accord with the law in demanding this; and if the injured party, through negligence or willfulness, allows the damages to be unnecessarily enhanced, the increased loss justly falls upon him.”

It was error, therefore, to grant appellee a peremptory instruction.

We think the judgment of the lower court should be reversed, and the cause remanded.

Reversed & remanded.

FARRAND COMPANY v. HUSTON.

[69 South. 997.]

1. **EXECUTION.** *Claims of third persons. Affidavit. Issues. Date. Sunday. Validity. Principal and agent. Ratification.*

Under Code 1906, section 4992, so providing, on the return of an execution with affidavit and bond of a third party claiming the

property, the court shall direct an issue to try the right of property, but this does not require a trial of such issue, where no valid affidavit has been filed setting forth the claim of the third person, and where the validity of the affidavit is challenged, an issue is presented which must be tried before the right of property can be tried.

2. **SUNDAY. *Affidavits. Date. Validity.***

An affidavit of a third person claiming property levied upon under execution, is valid though dated on Sunday, if in fact it was not made on that day.

3. **PRINCIPAL AND AGENT. *Affidavits for principal. Ratification.***

Although an agent making an affidavit in a claimant's issue, may not have been authorized to do so, yet the claimant has full power to ratify and adopt it.

APPEAL from the circuit court of Neshoba County.

HON. C. L. DOBBS, Judge.

Suit by H. A. Huston against John Black and others in which the Farrand Company filed an affidavit, alleging that the property levied on belonged to it. From a judgment quashing the affidavit, the claimant, appeals.

At the September term, 1911, of the court below judgment was rendered against John Black and three others in favor of appellee, H. A. Huston, upon which an execution was issued and placed in the hands of the sheriff, who levied on several pianos in possession and as the property of John Black. An affidavit was made and filed with the sheriff by J. Q. Hunter, Jr., an attorney at law, in behalf of the Farrand Piano Company, setting forth in the proper form that the pianos levied on were the property of that company and not of the defendant in execution. Bond was given by the claimant and the pianos released. At the term of the court below to which this execution was returnable a motion was made by the plaintiff in execution to quash the claimant's affidavit for the following reasons, among others:

"Because the party who made said affidavit had no authority from the said Farrand Company to make the same."

Statement of the case.

[110 Miss.]

"Because said affidavit was made on the first day of the week, commonly called Sunday."

This motion was sustained and a judgment, after verdict on a writ of inquiry, was entered against the claimant for the value of the property levied on. Afterwards, and at the same term of court, this judgment, for some reason not disclosed by the record, was set aside, and the cause continued to the next term of the court. At the succeeding term a motion was filed on behalf of the claimant for the discharge of its bond under the provisions of section 4993 of the Code, on the ground that by default of the plaintiff in execution an issue for the trial of the right of property had not been made up at the term to which the execution was returnable. This motion was by the court overruled, and thereupon evidence was taken on the motion to quash. At the close thereof the motion to quash was again sustained, and judgment, after verdict upon a writ of inquiry, was again entered against the claimant for the value of the property levied on. The claimant's affidavit was dated the 10th day of December, 1911, which was Sunday; but the uncontradicted evidence introduced in its behalf disclosed that the affidavit was in fact made on Saturday, and that the date in the affidavit was a clerical error. In order to sustain its contention that the affidavit was made without authority from the claimant, the following letter was introduced in evidence by the plaintiff in execution:

Philadelphia, Miss. Jan. 11, 1912.

"The Farrand Co., Detroit, Mich.—Gentlemen: Have you employed counsel in suit now pending in circuit court here in which H. A. Huston is plaintiff in execution and you are claimant in claimant's issue. Let me know at once. Will write you full particulars.

"Yours truly,

W. M. LEWIS."

Lewis was the attorney for the plaintiff in execution. To this letter the claimant replied as follows:

"Detroit, Michigan, 15, 1912.

"W. M. Lewis, Esq., Philadelphia, Miss.—Dear Sir: We are in receipt of yours of the 11th inst., in regard to suit now pending in the circuit court, in which H. A. Huston is plaintiff. We have no record whatever of this party having suit against us, and wish you would kindly advise us the particulars of the case promptly.

"THE FARRAND COMPANY."

"Per F. L. COWAN."

J. Q. Hunter, the attorney who made the affidavit for the claimant, testified that he was requested by Black, the defendant in execution, to make the affidavit and to look after the Farrand Company's interests, and that his act in so doing had since been ratified by the company. In what manner the claimant ratified the making of the affidavit does not appear, but Hunter's general statement that such is the fact was not challenged in any way.

J. F. N. Huddleston, for appellant.

We think a recital of the facts are amply sufficient to justify a reversal. The proceedings are entirely statutory and must be followed or the transgressor must take the consequences. There is only one thing for the plaintiff in execution to do, when the affidavit and bond are returned into court, i. e. to tender issue or move the court that an issue be made. Section 4992 is imperative; and section 4993 gives the consequences by which he must abide if he selects to try some other than the prescribed course. Code 1906, secs. 4992 & 4993.

The court should have sustained claimant's motion for discharge. It is the duty of the plaintiff in execution to see that return is made early enough for him to have the issue propounded at the first term of court. *Sears v. Gunter*, 39 Miss. 338; *Watkins v. Duval*, 69 Miss. 364, 13 So. 727.

On second assignment of error, we think the case should be reversed. The law is with claimant; the plain-

tiff in execution cannot raise the question of agency between the claimant and his attorney. That is a matter entirely between them and the after recognizance by claimant of Hunter's acts in its behalf absolutely clinched his agency for claimant and cannot be disputed by the claimant himself. This is elementary. We do not feel that it is necessary to further worry the court. We confidently ask a reversal.

Byrd & Byrd, for appellee.

This is a case in which the plaintiff in execution, Huston, Appellee, had a judgment against John Black, et al., and on that judgment execution was issued, placed in the hands of the sheriff, and levied on certain property. Whereupon John Black, the party whose property was levied on under the execution, and the defendant in execution, procured one J. Q. Hunter to represent himself as attorney for The Farrand Company to make affidavit and claim the property levied on as the property of the said Farrand Company. He, Hunter, made the affidavit and bonded the property of The Farrand Company. The court after hearing this testimony, being convinced that the claimant's affidavit was made on Sunday, and that the said Hunter had no authority whatever to make the affidavit for The Farrand Company, having been procured to do so by Black, the defendant in execution, sustained the motion of plaintiff in execution to quash the affidavit made by Hunter, claiming the property as The Farrand Company's, and granted plaintiff in execution a jury of inquiry to assess the value of the property. This claimant's affidavit was made on the 10th day of December, 1911, same being Sunday. On the 15th day of January, 1912, The Farrand Company wrote W. M. Lewis that they had never heard of this litigation. We deem it useless to make any further comment on this record. Respectfully submitted.

SMITH, C. J. delivered the opinion of the court.

(After stating the facts as above.) The court below committed no error in overruling the claimant's motion for the discharge of its bond. It is true that section 4992 of the Code provides that:

"Upon the return of the execution with the affidavit and bond, if any, the court shall, on motion of the plaintiff, in execution, direct an issue to be made up between the parties to try the right of property at the same term, unless good cause be shown for a continuance."

—but an issue of this character presupposes a valid affidavit; and we do not understand the statute to require the trial of such an issue when no valid affidavit has been filed setting forth the claim of a third person to the property levied on. If the validity of the affidavit is challenged, an issue is presented which must of necessity be tried by the court before the right of property can be tried. The statute must be given a reasonable construction as was done in *White v. Roach*, 98 Miss. 309, 53 So. 622, and, so construed, it seems to us necessarily to follow that the court below committed no error in holding that the plaintiff in execution was not in default in not causing an issue to be made up to try the right of property while his motion to quash remained undisposed of.

The motion to quash, however, should have been overruled for the affidavit, according to the evidence, was not made on Sunday. And though Hunter may not have been authorized to make the affidavit, the claimant had full power to ratify and adopt it.

Reversed and remanded.

O'LEARY v. ILLINOIS CENT. R. Co.

[69 South. 713.]

1. *CARRIERS. Passenger accommodations. White and negro passengers. Sufficiency. Action. Instructions. Trial. Argument of counsel.*

The statute law of Louisiana (Act No. 111 of 1890), requiring separate accommodations for white and negro passengers on railroad trains, applies to intrastate passengers and it was error to give an instruction on the statute, in an action by a passenger on an interstate train for being forcibly deprived of his seat in a comfortable car to accommodate a negro excursion and to ride in the caboose.

2. *TRIAL. Instruction. Argument of counsel.*

Every litigant in a civil case has a vested constitutional right to have his case presented to the jury by counsel, and to have the argument of his counsel heard by the jury, untrammelled by any suggestion from the court that are calculated to minimize the force or cheapen the worth of legitimate argument, and an instruction which states that the unsworn statements and arguments of attorneys are neither evidence nor law, and cannot be considered, while technically accurate, intimates that the attorneys may make statements not supported by the evidence, and practically directs the jury to disregard their arguments and is to be condemned.

APPEAL from the circuit court of Attala county.

HON. J. A. TEAT, Judge.

Suit by J. B. O'Leary against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Flowers, Brown & Davis, for appellant.

The passenger plaintiff was at the time en route from Kosciusko to New Orleans, Louisiana. He was an interstate passenger.

The statute of Louisiana quoted in the said instruction appears on pages 1498 and 1499 of Wolff's "Constitution and Revised Laws" of Louisiana. And this statute has been expressly held by the Louisiana court to apply only to the transportation of intrastate passengers. *State ex rel v. Hicks, et al.*, 44 La. Ann. 770; *Ex Parte Plessy*, 45 La. Ann. 80; *State v. Pearson*, 110 La. 387, 390. And the supreme court of Mississippi has held the same thing. *L. N. O. & T. Ry. Co. v. Miss.*, 66 Miss. 662.

Though in *Alabama & Vicksburg Ry. Co. v. Morris*, 103 Miss. 511, our court held that the law could be enforced to require the separation of the races as to a passenger buying a ticket at Vicksburg entitling her to passage over defendant's line to Meridian, both points being within the state. The *Morris* case went to the supreme court of the United States where it was dismissed on motion of plaintiff in error, the railroad company.

But the rule is settled in Louisiana that the statute depended upon in the present case has no application to interstate passengers. And the holding of the Louisiana court has been upheld by the supreme court of the United States. *Plessy v. Ferguson*, 163 U. S. 537, 41 L. Ed 256.

So it appears that instruction 3 was erroneously given for several reasons. In the first place it is not proper to take a statute and submit it to a jury for its construction. In the second place the statute if operative at all in this case would be misleading when given to the jury as a whole. And in the third place the statute has no application whatever to the case at bar. And the jury was told that "it was the duty of conductors, passengers and railroad officials to obey said laws." It was not the duty of the passengers and conductor to obey the said laws in this instance. The said laws had nothing in the world to do with it. We cannot conceive of the court saying that this error is not fatal under the peculiar circumstances of this case.

S. L. Dodd, Leftwich & Tubb and T. S. Ward, for appellant.

It will be observed that the wrong and injury done to plaintiff took place in the state of Louisiana, at Hammond, and thence to New Orleans, in said state, and it became the duty of the judge to test the negligent conduct of the Railroad Company according to the laws of the state of Louisiana, of which now under our statute the trial judge must take judicial notice. See Code of 1906, section 1015. In the light of the sharply disputed questions of fact, the charges asked by and granted to the defendant must be clearly read and analyzed, and since the case must turn on the correctness of the charges granted the defendant in the main we will give to them most of our attention in this brief.

Charge number three granted the defendant Company is found at page 218 of the record, and is as follows: The court instructs the jury for the defendant that the laws of Louisiana as bearing upon separate coaches or compartments for the races are as follows: "That all railway companies carrying passengers in their coaches in this state shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure the separate accommodations; provided, that this section shall not be construed to apply to street railroads. No person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to. That the officers of such passenger trains shall have the power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; and any passenger insisting on going into a coach or compartment to which by race he does not belong, shall be liable to a fine of twenty-five dollars or in lieu thereof

to imprisonment for a period of not more than twenty days in the parish prison, and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine of twenty-five dollars or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state."

And it was the duty of both passengers and railroad officials to obey said laws." 2 Const. & Rev. State, La., page 1498.

It will be observed that this copy or this charge is a literal copy of the laws of Louisiana, and is put within quotation marks. The whole statute is thrown to the jury as a tub to the whale, with the parting admonition of the court in the last sentence, "and it was the duty of both passengers and railroad officials to obey said laws." What the law meant, how it should be weighed and considered by the jury, was left wholly to the jury to speculate upon; it was not digested and interpreted in plain terms by the court, as plain common business men might read and interpret it, but it was tossed to them in the very terms in which it was ground out in the legislative mill, with the admonition that it was the duty of the passengers and the railroad officials to obey it. It is the duty of a trial court always under our jurisprudence to construe any writing which is introduced in evidence before the jury, and not to refer it to the jury for the jury to speculate on its meaning. *Life Ins. Co. v. Herron*, 56 Miss. 643; *Railroad Co. v. Anderson*, 110 Miss. 4

57 Miss. 829; *Brown v. Roberts*, 58 Miss. 126; *Whitney v. Cook*, 53 Miss. 551.

All the more necessary is it that the lower court bring to the jury's attention the laws of a foreign state with which they are entirely unfamiliar, to digest and present them in plain and unambiguous terms, that the jury may read and understand them. It was for a long period of time in Mississippi that the foreign law had to be proved as any other fact, but our legislature recognizing that the courts themselves supposed to be better capacitated in law learning should take judicial notice of foreign laws. Code of 1906, section 1015. And if the court must take judicial notice of those laws, it is not only its duty but the universal practice for it to interpret what they mean. These laws may be expressed in a foreign language, they may come in the technical statutory form that it is difficult to interpret, requiring lawyers or men with the judicial mind to digest and apply them, and it is useless we think to invoke authority to the effect that the court must interpret these laws, and not dish them out to the jury *in totidem verbis*. See subject "Interpretation," 1 Bouvier's Law Dictionary.

Now in the light of the trite observations we have made touching this matter, let us deal with the statute of Louisiana which was quoted in full in charge three. The first paragraph of the statute provides that equal but separate accommodations shall be provided for the white and colored races by the railroad company furnishing two or more passenger coaches for each train or by dividing the passenger coaches by partition. Street cars are exempted, and the last sentence of the paragraph is that no person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to. The complaint in the declaration is the opposite to what is common. The plaintiff, a white man, sued the company because they de-

prived him of passage in a comfortable and clean coach, by driving him out of it and into a filthy caboose, and that he was therefore not given equal and separate accommodations with the negroes. One of the leading vices of the granting of this charge is that the second paragraph of the statute quoted says after stating that the passenger shall occupy the coach or compartment to which he is assigned by the conductor, and that if he insists on going into a coach or compartment of the race to which he does not belong, he shall be liable to fine and imprisonment in the parish prison. This second paragraph finally enacts that if the passenger refuses to occupy the coach or compartment to which he is assigned by the officer of the company, that he, the officer may refuse to carry him, and for such refusal neither he nor the railroad company shall be liable for damages in any of the courts of the state. Now the main vice of submitting this charge to the jury without comment as to its meaning is its palpable liability to lead the jury astray as it no doubt did. On reading the second paragraph, the plain jurymen doubtless concluded that as O'Leary was in the state of Louisiana and bound to obey its laws, that he ought to be grateful that the officials did not put him off of the train and have him fined twenty-five dollars or put in the parish prison, and that it was a matter of grace in the Railroad Company that he escaped the infliction of such punishment. This charge leaves totally out of consideration and leaves the jury at sea as to the liability of the company for its negligence in not furnishing plenty of passenger cars and in not keeping them lighted and clean, and on some flimsy pretext in driving a white passenger out of a comfortable coach and giving it to negroes, and then quartering the white passenger in a filthy caboose from three to six coaches in the rear. But it is almost idle to speculate on the view that the jury took of this charge. It is the crude undigested statute of the state of Louisiana as it seems, and it was the

only law which the jury were bound to obey. This assignment of error presents squarely to the court this query: Where an interstate train carrying passengers after it reaches a foreign state is guilty of negligence and guilty of disregarding the rights of the passengers, can the trial court of this state quote *in totidem verbis* to the jury the undigested statute, telling the jury that it is the duty of the passengers and the railroad officials to obey that law and that law only of course, and thus leave it with them, almost every fact in the case being controverted by the witnesses. It is true enough that the next instruction, charge four, tells the jury what the law of Mississippi is on the subject, but the preceding charge had impressed the jury no doubt, as did the arguments of those to follow that it was the law of the state of Louisiana that controlled in the case, and that law dominated their verdict; so that the jury was necessarily left to follow their own vain speculations as to what the statute meant, and were thus led astray by this charge number three.

Charge number five is as follows, which we here quote for the convenience of the court: "The court instructs the jury for the defendant that in order for them to reach a conscientious and legal verdict in this case, they must arrive at it by relying upon the credible evidence in the case and upon the instructions given by the court. The unsworn statements and arguments of the attorneys for either side and passion and race prejudice, if any, are not evidence or law and under your oaths you cannot consider them as evidence or law in reaching a verdict in this case."

This charge encroaches upon the constitutional rights of the citizen in submitting his grievances to the courts of the country by the mouth of counsel. By section 25 of the Constitution, it is provided that no person shall be debarred from prosecuting or defending any civil cause for or against him or herself before any tribunal of

the state by him or herself or counsel or both. The charge seems to be constructed and so worded as to warn the jury to give no heed to the unsworn statements and arguments of attorneys for either side and passion and race prejudice if any. It overlooks the law of the land that all attorneys practising before the courts are sworn and are there practising under their oaths, and that it is a vested constitutional right in every litigant to have his cause presented to the jury by counsel, and to have the arguments of such counsel heard by the jury untrammelled by insinuating suggestions from the court that these arguments ought not to be heeded. It is true this charge in its last sentence says, "that you should not consider them (meaning the statements and arguments of counsel) as evidence or law in reaching a verdict in this case." The essential implication of a charge like this is to the effect that the jury should hear the law and the evidence, and then take the bit in their own mouths, and ignore all pleas and arguments of counsel in presenting their client's claims. In granting this charge at the request of the defendant, the special judge in the trial court went far afield, and invaded the prohibited domain of the constitutional rights of this plaintiff.

The charge is further vicious in this, when it says, "and passion and race prejudice, if any, are not evidence or law and under your oaths you cannot consider them evidence or law in reaching a verdict in this case." The only passion or race prejudice found in this case, if any at all and we think there is none, was imported into it by the evidence. If the plaintiff's counsel transgressed the rules of propriety in their arguments and appealed to passion and race prejudice, there was a remedy for the defendant's counsel; it was their privilege to take down the words of counsel which transgressed the proprieties and the evidence, and have the court then pass upon the propriety, and warn the jury to disregard such arguments. The court had no right to denounce it ahead of

time and in general; it could only deal with it in the concrete; and the granting of the charge was a criticism of the right of argument that the plaintiff ought not to be called upon to bear. This is not a question of the court's restraining counsel from traveling out of the record or from appealing to passion or race prejudice in an improper way, or in stating unjustifiable facts. Here the court injects itself as a censor and denounces the right of argument by just inference and the force of argument, and encroaches upon the constitutional privilege of appellant, which is not permissible. *Martin v. The State*, 63 Miss. 505; S. C. 56 Am. Rep. 812 and note by editor; 2 Enc. of Pleading & Practice, 699; 2 A. & E. Enc. of Law, 699-700, note 1, citing many cases and at length BREWER, J., in *Douglas v. Hill*, 29 Kan. 527; 28 Cyc. 1470a and notes.

Within the limit of the testimony the argument of counsel is and should be free, but that freedom does not extend either to the statement or the assumption of facts, or to commenting upon facts not in evidence, to the prejudice of the adverse party. *Perkins v. Guy*, 55 Miss. 153; *Cavanah v. State*, 56 Ib. 299; *Cross v. State*, 68 Ala. 476; *Wolffe v. Minnis*, 74 Ib. 386; *State v. Smith*, 75 N. C. 306; Proffat on Jury Trials, sec. 250."

The charge we are assailing amounts to censorship or restriction by the court in a plain and palpable instruction to the jury, as to the heed they should give to the arguments of counsel.

In 2 Enc. of Pl. & Pr., page 700, the distinguished Judge ROGER A. PRYOR, from the note, is quoted as saying: "Not a matter of discretion.— In *Fareira v. Smith* (C. Pl.), 22 N. Y. Supp. 939, Judge PRYOR said: 'Be the issue simple or complex, counsel have a legal right to be heard upon it before the jury. If the court may deny the privilege upon the assumption that the case is too plain for argument, then the exercise of the privilege stands not upon the legal right but upon the misconception or

caprice or arbitrary volition of the court. To this proposition I cannot assent. The *dictum* in its support (*People v. Cook*, 8 N. Y. 77, 59 Am. Dec. 451), is of no authority, and is repugnant alike to the rights of litigants and the duty of counsel, 2 Rum. Pr. 304; *Douglas v. Hill*, 29 Kan. 527, per BREWER, J.; *Garrison v. Wilcoxson*, 11 Ga. 154.' "

If the court may say to the jury as it did in charge five, "that in order for them to reach a conscientious and legal verdict in this case, they must arrive at it by relying upon the credible evidence in the case and upon the instructions given by the court," then what becomes of the right of argument guaranteed the citizen by the Constitution?

Mayes & Mayes, for appellee.

After the original brief was filed by Mr. Dodd, and after we had prepared our answer to Mr. Dodd's contentions, Mr. J. N. Flowers was associated with Mr. Dodd; and now, at the last hour, Mr. Flowers comes forward with this entirely new point, to wit, that the statute is not applicable, that the statute relates to the duty that the railroad owed solely to persons engaged in intra, as distinguished from interstate travel.

This court has repeatedly declined to consider such questions as these, raised for the first time in the supreme court. For this reason, if for no other, we feel assured that this court will not sustain Mr. Flowers' contentions, advanced in his rejoinder brief.

In this rejoinder brief, Mr. Flowers cites numerous authorities claimed by him to be in support of his contention that the statutes in question do not control the case at bar; but when this court comes to examine those authorities, it will see that they are not in line. Those authorities have points in them which distinguish them from the case at bar; as for instance, a number are cases dealing with the Jim Crow law, requiring the street railway

companies to separate the races by screens; it appearing in those cases that the street railway companies were not engaged in interstate commerce, but were operating entirely within the limits of certain cities and states.

On the other hand, supporting our contention that the statutes in question are applicable to the case at bar we call the court's attention to the case of *A. & V. Ry. Co. v. Morris*, 103 Miss. 511, this being a case recently decided by our supreme court, involving the question as to whether or not the Mississippi statute, providing for equal and separate accommodations for the races was controlling in a case where the passengers were engaged in interstate travel. The plaintiff in that case was a white lady, who was traveling from Vicksburg, Mississippi, to New York City. She took passage in a sleeping car on one of defendant's trains, somewhere along the route within this State—Meridian, we believe. A negro passenger boarded this same train, holding a sleeping car ticket, which entitled him to a berth in this same car in which the white lady had taken passage. The lady demurred to this, demanding that the conductor either assign her or the colored passenger to another coach; the conductor refused to comply with her demand, and she filed a suit for damages on account of the indignity imposed upon her by forcing her to ride in the same coach with a person of a different race. The defendant in that case raised the very point which was raised here—to wit, that the Mississippi statute requiring railroad companies to furnish separate accommodations for the races, was not applicable where the passengers were engaged in interstate travel. But in the opinion, rendered by Judge Cook, this honorable court expressly held that the case of the *L. N. O. & T. R. R. Co. v. State*, 66 Miss. 662, that being the decision upon which our opponents pin their faith, was not applicable to this sort of case. The court said, (see last paragraph, p. 517):

" . . . It would serve no good purpose to review the several cases decided by the supreme court of the United States, and cited in support of the contention of appellant, as we believe no case can be found decisive of the precise question raised in the instant case. The cases most nearly approaching the subject have been analyzed and, in our opinion, none of them have pronounced a state statute, similar to our own, an invasion of the national authority to regulate and control commerce between the states, should it be interpreted to mean that the statute applies to interstate travelers aboard trains forming a part of a chain of carriers engaged in the business of transporting passengers taken up within the state for carriage to a point without the state. This is exactly the question involved in this case, and such a passenger is claiming damages because negro passengers were assigned to the same Pullman car to which she was assigned, and which she was compelled to occupy, or retire to one of the day coaches attached to the train; there being no sleeping car other than the one occupied by the negroes. . . .

"The legislature, in the exercise of its power to police the highways of commerce running through the state, enacted the statute in question to promote the peace, comfort and general welfare of the public. . . .

"A riot upon an interstate train growing out of the refusal of common carriers to recognize a situation known to every Mississippian—black and white—would endanger the lives and disturb the peace of all persons passengers on the train, intrastate and interstate; and we therefore decline to limit the application of the statute to intrastate commerce. Possessing the knowledge of local conditions common to all residents of our section, we confess some surprise that there was no sequel to the event described by the record."

Our opponent, Mr. Flowers, says that this case of the *A. & V. R. R. Co. v. Morris*, from which we have just

quoted, was appealed to the supreme court of the United States, but that some compromise, or other disposition of the differences, was reached before the case was tried there. Possibly that is true. The limited time we have had in which to reply to this brief has prevented us from looking into that matter. But be that as it may, the opinion of the Mississippi court in this case is the last word on the law controlling these matters. While it may be true that the opinion of the Mississippi supreme court has not been affirmed by the supreme court of the United States, it is also true that that opinion has not been reversed—which is to say that the opinion of our supreme court stands supreme today. We know that our court went into this matter with great care and detail, and that the opinion of the court, as rendered in the Morris case, is decisive of the questions here involved. We know that when this court shall have read the briefs of counsel, and the record in the cause, it will be impressed with the fact that appellant has had a fair trial in this cause, and that the verdict of the jury was fully warranted by the testimony. And for that reason, we feel, assured that this court will affirm the judgment of the court below.

STEVENS, J., delivered the opinion of the court.

Appellant, as plaintiff in the court below, brought this suit against the Illinois Central Railroad Company to recover damages for the alleged wrongful acts of the defendant's conductor and employees in forcing the plaintiff to give up his seat in a vestibule car and to accept insufficient accommodations in an inferior coach or caboose, while plaintiff was a regular passenger on an excursion from Kosciusko, Miss. to New Orleans, La. The Declaration charges that plaintiff, with several associates, boarded a well-advertised excursion train being run by the defendant company from Aberdeen, Miss., to New Orleans, La.; that plaintiff and his companions

secured comfortable revolving chairs in a handsome plush coach, equipped with good lights and supplied with drinking water and the other usual conveniences of a first-class passenger coach; that he was well cared for in this car until the train reached Hammond, La., where the conductor of the train ordered plaintiff and the passengers of the coach in which plaintiff was seated to vacate this coach to make room for a large crowd of negro excursionists; that plaintiff and his friends protested, but that the conductor, with the aid of a policeman, armed with his "billy," ordered plaintiff from this vestibule car, which had been assigned to white passengers, and attempted to move plaintiff with force and arms; that the conductor used violent and offensive language, and permitted the car to fill rapidly with negroes, before plaintiff and the other white people, both ladies and gentlemen, vacated; that plaintiff was forced and compelled against his consent and over his protest to leave his comfortable seat and surroundings, and to ride in a caboose or inferior coach, over which was written "For Colored People Only," and which was packed and crowded with negroes and toughs, and where there were no seats or proper accommodations; that plaintiff was compelled to ride the balance of his journey on the arm of a seat filled with other passengers. There are other allegations in the declaration not necessary to detail. Issue was joined and much evidence introduced by both parties on the trial of the case below. A verdict was returned for the defendant, and from the judgment based thereon plaintiff prosecutes this appeal.

The evidence on behalf of the plaintiff, briefly stated, is to the effect that, while plaintiff and his companions were enjoying the journey in a clean and expensive coach, well provided with seats, lights, and water, he was forced by the conductor, with the assistance of an officer from Hammond, La., to surrender his seat and to betake himself and his baggage through several coaches, already

crowded, to the rear coach of the train; that this rear coach was "just a dirty, filthy caboose, with just a dingy old oil lamp, with the chimney blacked;" that the floor of this coach was littered with tobacco stubs and smeared with tobacco juice and dirt; that plaintiff could not obtain a seat, but was compelled to ride on the arm of the seat of other passengers; that this coach had a terribly bad odor and was not provided with drinking water. The evidence on behalf of plaintiff is further to the effect that the conductor "grabbed hold of Mr. O'Leary" and pushed him out on the platform; that in this the conductor was assisted by the officer; that plaintiff was humiliated and wronged by the offensive and abusive treatment of the conductor, as well as the porter and the officer, and that his contract of carriage was violated. The evidence for the plaintiff shows, also, that negroes began to file into the car before the plaintiff and his companions had time to move out. The evidence discloses additional details and circumstances in aggravation of the complaint. The testimony on behalf of the defendant was in sharp and direct conflict with that on behalf of the plaintiff.

We are asked to reverse the case because of the granting of erroneous instructions in behalf of the defendant. Instructions Nos. 3 and 5, complained of, are in the following language:

"No. 3. The court instructs the jury, for the defendant, that the laws of Louisiana, as bearing upon separate coaches or compartments for the races, are as follows:

"That all railway companies carrying passengers in their coaches in this state shall provide equal, but separate, accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train, or by dividing the passenger coaches by a partition so as to secure separate accommodations: Provided, that this section shall not be construed to apply

to street railroads. No person or persons shall be permitted to occupy seats in coaches other than the ones assigned to them on account of the race they belong to.

"That the officers of such passenger trains shall have the power and are hereby required to assign each passenger to the coach or compartment used for the race to which such passenger belongs; and any passenger insisting on going into a coach or compartment to which, by race, he does not belong, shall be liable to a fine of twenty-five dollars, or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and any officer of any railroad insisting on assigning a passenger to a coach or compartment other than the one set aside for the race to which said passenger belongs shall be liable to a fine of twenty-five dollars or in lieu thereof to imprisonment for a period of not more than twenty days in the parish prison; and should any passenger refuse to occupy the coach or compartment to which he or she is assigned by the officer of such railway, said officer shall have power to refuse to carry such passenger on his train, and for such refusal neither he nor the railway company which he represents shall be liable for damages in any of the courts of this state.

"And it was the duty of both passengers and railroad officials to obey said laws."

"No. 5. The court instructs the jury, for the defendant, that, in order for them to reach a conscientious and legal verdict in this case, they must arrive at it by relying upon the credible evidence in the case and upon the instructions given by the court. The unsworn statements and arguments of the attorneys for either side, and passion and race prejudice, if any, are not evidence or law, and under your oaths you cannot consider them as evidence or law in reaching a verdict in this case."

For the purposes of this case it is not necessary to set out in detail the evidence for the railroad company. It is conceded every complaint made by the plaintiff

is contradicted by the proof on behalf of the defendant. The case was one for the jury to decide upon proper instructions.

Instruction No. 3 presents to the jury *in haec verba* the statute of Louisiana providing for and forcing separate accommodations for white and negro passengers. The granting of this instruction in the present case was, in our judgment, error. This statute has been held by the Louisiana court to apply only to intrastate passengers, and had no direct bearing upon the rights of plaintiff, an interstate passenger. *State ex rel. v. Hicks et al.*, 44 La. Ann. 770, 11 So. 74; *Ex parte Plessy*, 45 La. Ann. 80, 11 So. 948, 18 L. R. A. 639; *State v. Pearson*, 110 La. 387, 390, 34 So. 575; *Plessy v. Ferguson*, 163 U. S. 537, 16 Sup. Ct. 1138, 41 L. Ed. 256. Under the peculiar facts of the instant case, the giving of this instruction amounted in reality to the granting of a peremptory instruction. By the concluding paragraph of this instruction the jury are told that "it was the duty of both passengers and railroad company officials to obey said laws;" that is, to obey the requirements of this particular statute of Louisiana. The jury by this instruction are told that, if the conductor had not removed plaintiff from the coach in question, the conductor would have been liable to fine and imprisonment, and that, if the passenger refused to occupy the coach or compartment to which the officer had assigned him, the railway company might refuse to carry the passenger any further, and for such refusal the railroad company would not be liable for damages. The jury must have been imbued with the idea that plaintiff on the occasion in question was insisting upon the law being violated, while the conductor was simply obeying the law, and thereby avoiding the unpleasant experience of being cast into a parish prison. The statute in question had nothing to do with this case. If it had no application to the case, then the giving of it is reversible error. We do not understand the grava-

men of the complaint to rest upon the mere compulsory removal from one coach to another. The chief ground of plaintiff's complaint lies in the fact, according to plaintiff's evidence, that he was forced to surrender ample and comfortable accommodations, and to ride the balance of his journey without a seat and without decent accommodations, to which, under his contract of carriage, he was entitled. The consideration of this main issue by the jury must have been beclouded by instruction No. 3.

We must condemn, also, instruction No. 5 granted the defendant. Every litigant in a civil cause has a vested constitutional right to have his case presented to the jury by counsel, and to have the arguments of his counsel heard by the jury, untrammelled by any suggestions from the court that are calculated to minimize the force or cheapen the worth of a legitimate argument. It is true that this instruction simply tells the jury that unsworn statements and arguments of attorneys are not evidence or law in the case. As a technical proposition of law this might be true. There is in this instruction, however, a veiled suggestion that counsel in this case might indulge in "unsworn statements"—a warning that the attorneys, as sworn officers of the court, are liable to present to the jury statements not justified by the evidence. By it the jury is really in fact directed to disregard the arguments of the attorneys. The legitimate pleas and arguments of counsel are helpful to a jury, and it is the duty of the jury to give respectful consideration to the arguments of counsel *pro* and *con*. If counsel so far forgets himself as to travel out of the record, then his adversary has the right to except, and the court has the right to reprove counsel, and to condemn any illegitimate utterances.

It will not be necessary to consider the other instructions complained of. Let the judgment of the lower court be reversed, and the cause remanded.

Reversed and remanded.

PURVIS ET AL v. ROBINSON, TAX COLLECTOR, ET AL.

[69 South. 673.]

1. SCHOOLS AND SCHOOL DISTRICTS. *County school boards. Meetings. Statutory provisions. Consolidated districts. School taxes. Enjoining collection.*

Code 1906, section 4512, provides that, the county superintendent shall be president of the school board, and shall convene it annually, prior to the first day of August, to define the boundaries of the school districts of the county outside of the separate school districts, or to make alterations therein, and to designate the location of the schoolhouse in each district if not already located. The only effect of that section is to require the board of education to hold a meeting before the 1st day of August in each year for the purpose of considering the matters named in said section. This work is required to be done before the 1st day of August, and this is all. It does not prevent the board from having repeated meetings before the 1st day of August to carry out the provisions of this section.

2. CONSOLIDATED SCHOOL DISTRICTS. *School taxes. Statutory provisions.*

A school district established under section 3, chapter 253, Laws 1912, must contain an area of twenty-five square miles but it need not embrace twenty-five full sections, in order that the specified tax may be levied.

3. TAXATION. *Enjoining collection. Statutory provisions.*

Section 533, Code 1906, affords the only authority for equity jurisdiction of suits to enjoin the collection of taxes levied or attempted to be collected without authority of law.

APPEAL from the chancery court of Rankin county.

HON. G. C. TANN, Chancellor.

Suit by J. T. Purvis and others against G. O. Robinson, Tax Collector, and others. From a decree sustaining a demurrer to the bill and dismissing it, complainants appeal.

The facts are fully stated in the opinion of the court.

A. J. McLaurin, Jr., for appellants.

The order of the board of supervisors of September 8, 1914 is void and the tax levy is void. First: Because the district embraced in that order does not contain twenty-five square miles of territory; is not composed of whole sections, and is not compact. *Gore v. Doolittle*, 77 Miss. 620. Having enough land to make twenty-five square miles in quantity is not sufficient. *Ib.*

The legislature of 1912 had this decision, construing what a given number of square miles means in formation of districts, before them when they passed chapter 255, Laws of 1912.

Most states wherein existing public schools may be consolidated have legislative authority to do so. This state has not. But under the sound reasoning of this court in the case of *Bufkin v. Mitchell*, reported in the 63 So. Rep., 458, it would seem that such legislative authority is not needed. Under existing laws it is within the power of school boards to consolidate existing schools provided, of course, there is not an abuse of this authority. For instance: One school district may embrace seven square miles and another and adjoining one may embrace eight square miles. If it is not an abuse of such authority by reason of water courses dividing it, or the like, the school board has the power to consolidate the two schools. The school thus formed would be a consolidated school district, but the board of supervisors could not levy a valid tax on it because the authority given them to levy taxes on consolidated school districts is contained in section 3, chapter 255, Laws 1912, and a tax can only be levied on such districts containing "Not less than twenty-five square miles." Laws 1912, pages 323-324.

The shape of the district as shown by the map of the land embraced in the order, herewith filed, condemns it. *Gore v. Doolittle*, *ib.* The order shows on its face that it is void and can be collaterally attached. *McComb v.* 110 Miss. 5.

Ellett, 85 Miss. 505, *Garner v. Webster County*, 76 Miss. 565, and cases there cited.

The order of the board of supervisors of September 8th is void for the further reason, that it seeks to levy the tax on a district attempted to be formed by an order of the school board of July 7, 1914, which is itself void.

The order of the school board of July 7th is void because the school board of April 25th prior had, by its order of that date, fixed the boundaries of the cross-roads consolidated school district.

Section 4512, Code 1906, directs the county superintendent to convene the school board prior to the first day of August of each year for the purpose of defining boundaries of school districts. It does not state what time before August, and the order of April 25, 1914, was valid and legal so far as time was concerned. At a subsequent meeting of that year they had no authority over the order of April 25th. *McComb v. Ellett*, 8 S. & M. 505.

But even if it be held that the order of April 25th is vacated by the order of July 7th, the latter order is void because of the method employed in its adoption.

A casual glance at the record will show that the district as defined in the order of July 7th was formed to cut out those who opposed a tax levy and cut in some who favored it. A look will reveal that the school board created the district on April 25th and defined its boundaries. On May 4th, they attempted to create it again and define its boundaries, leaving out sections 9 and 10 of township 4, range 5, and further ordered an election held in June following on the question of a bond issue.

On June 2d, before the election was held, they met again and denied the petition of certain persons asking to be taken out of the district, thereby adopting the former order as the boundaries. When the bond issue

was defeated they met again (July 7th) and once more changed the boundaries.

All this most reasonably appears from a glance at the record and such methods of forming districts of any kind is condemned in the case of *Gore v. Doolittle* cited above.

Stingily & McIntyre, for appellees.

No more could the board of supervisors inquire into the actions of the school board in the formation of this district than can any court inquire into the purpose of the legislature in passing a legislative act. Of course if the board of supervisors could not review the action of the school board in the formation of the district, this court, in a suit to enjoin the tax levied by the board of supervisors, cannot review the action of the school district board. Two separate suits, involving distinct matter, are involved.

"For the purpose of a suit to enjoin the collection of a special tax in school district, the district must be presumed legally organized, as its existence must be inquired into in a direct proceeding." *Board of Commissioners v. County*, 86 Pac. 24; 25 Am. & Eng. Ency. Law (2nd Ed.), 34; 35 Cyc. 846.

Am. Digest "Schools & School Districts" sections 24 (2) & 39; In this case the sole question to be determined by the court is, was there authority in the law for the levy? *Thompson v. Krutzer*, 103 Miss. 388.

For there to have been authority in the law two jurisdictional facts must have existed, and only two, to wit: 1. The school district must have contained twenty-five square miles; 2. A petition of the majority of the qualified electors of the school district.

It is the duty of the board of supervisors to pass on these two questions without reference to the school board's acts in the creation or formation of the district. If aggrieved persons desire to review the school board's acts, they must institute some direct proceedings.

"Actions of the board not involving jurisdictional power are conclusively right in this collateral litigation. It being, in this matter, of limited jurisdiction, the minutes must show that the jurisdictional facts were found to exist. This being done, there is no need ever to set forth the evidence in the judgment, and it is not controvertible, except on direct appeal." *Hinton v. Board of Supervisors*, 84 Miss. 536; *Board v. Ames*, 3 So. 37;

In this case, where the complainants seek to review the proceedings of the school board and of the board of supervisors, they must have appealed direct from the board of supervisors, upon a proper bill of exceptions and instituted some direct proceedings against the school board.

We deny that any fraud is charged against the board of supervisors. The charge that the school board cut in some parties and cut out some parties isn't a charge of fraud, because section 4512, Code of 1916, authorizes and empowers the school board to do this very thing. The power to change, alter and define necessarily carries with it the power to "cut in" and "cut out", and no fraud could be imputed to the school board in its doing the very thing it was empowered to do. Courts will not question a legislative body's purpose in doing a legislative thing, so that while the "cutting in and cutting out" are admitted, the purpose charged is not. Moreover this question has nothing to do with the jurisdiction of the board of supervisors, the question, is entirely and patently collateral.

It is contended by appellants that the record of the school board shows that on July 7th, the school board had exhausted its authority and had no further jurisdiction for the year 1914. We submit that the record shows that the school board was adjourned from time to time, subject to the call of the president. The school board record shows that this was the regular annual meeting, duly called for the purpose of fixing boundaries of schools, and it is conclusively presumed that the district

was properly formed, that is, on collateral attack. Aside from the idea that these were all adjourned meetings, it is our contention that section 4512 does not limit the school board to one meeting only, but that the board may convene to alter, change and define school boundaries at any time, provided, the boundaries are fixed prior to the first day of August, so the patrons may have reasonable notice of their respective school districts before the opening of free schools in September.

Cook, J., delivered the opinion of the court.

Appellants filed a bill praying for an injunction to restrain the collection of a four-mill tax levied by the board of supervisors of Rankin county upon the petition of a majority of the qualified electors of Cross Roads consolidated school district, approved by the county school board. A temporary injunction was issued. The defendants demurred to the bill, and also made a motion to dissolve the injunction. The demurrer was sustained, the injunction dissolved, and bill dismissed; wherefore this appeal.

There were several grounds of demurrer, but we will consider only one of them, which we think it determinative of this appeal, viz.: "There is no equity on the face of the bill." The board of education of the county met for the first time in 1914 on April 25th, and entered an order, in response to the proper petition of the electors and patrons of two public schools, consolidating said schools under the name of "Cross Roads Consolidated School District," embracing within its limits twenty-seven full sections of land. On May 4, 1914, the board of education held another meeting, at which time an order was made eliminating two sections from the school district as formed on April 25th, leaving the district with twenty-five full sections of land. On this last-named date an order was entered calling an election for the purpose of authorizing the bonds of the district. It is alleged in the bill that this contemplated bond issue was

rejected at the election. At this meeting certain other lands were added to the district. On June 2, 1914, the board of education held another meeting and rejected the two petitions praying that certain other lands be embraced in the consolidated district. Finally, on July 7, 1914, the board of education convened, and entered an order defining the limits of the Cross Roads consolidated school district. This order makes no reference to the previous meetings and orders of the board, but the district as described conforms to the district formed and described in the previous orders of the board.

It is contended by appellants that the tax which the tax collector is attempting to collect was levied by the board of supervisors "without authority of law," because the board of education exhausted its powers to consolidate school districts at its first and only legally authorized meeting on April 25th, and in support of this contention section 4512 of Code 1906 is cited. It appears that the order of the board of supervisors levying the tax was made in response to a petition from the qualified electors of the district described in the order of the board of education of date July 7, 1914, which district does not contain all of the land embraced in the first order made by said board. We quote section 4512, viz.:

"The county superintendent shall be president of the school board, and shall convene it annually, prior to the first day of August, to define the boundaries of the school districts of the county outside of the separate school districts, or to make alterations therein, and to designate the location of the schoolhouse in each district, if not already located."

As we understand the briefs of counsel, it is argued that the word "annually" in the section quoted means once in each year, and when the board meets once to consider the matters mentioned in the section, and adjourns, the board has no power to define school dis-

tricts, or to make alterations therein, or to designate the location of school houses, until after the 1st day of January and before the 1st day of August of the following year.

We do not so construe the statute. The only effect of section 4512 is to require the board of education to hold a meeting before the 1st day of August in each year for the purpose of considering the matters named. This work is required to be done before the 1st day of August, and this is all. The board of education has the power to meet at any time on the call of its president to conduct the business and exercise the powers intrusted to it; but, in regard to the matters mentioned in section 4512, a meeting for this purpose must be held before August 1st of each year. If for no other reason, meetings for the establishing and altering of school districts, and to designate the location of schoolhouses therein, should be held before August 1st, because, by section 4519 of the Code, the patrons of schools of this character are required to elect trustees on the first Saturday of August in each year, and therefore, if schools of this class are to be consolidated, it should be done before this time.

Again, it is insisted that the district established does not contain twenty-five square miles, within the meaning of section 3 of chapter 255, Laws of 1912, and for this reason the levy of taxes was *ultra vires*. *Gore v. Doolittle*, 77 Miss. 620, 27 So. 997, is cited in support of this view of the law. The area of land required by the statute is embraced in the consolidated school district, but it does not contain twenty-five full sections. In the case mentioned this court had under review a no fence law, or stock law, by which the owners of live stock in the proposed district would be forced to fence in their live stock, instead of their cultivated lands, and the court, taking into consideration the end to be accomplished by this change in the law, thought the legis-

lature intended to require the stock law districts to be formed of "entire sections of land, and should comprise a compact body of land making at least thirty-six square miles." It was admitted by the court that this construction could not be found in the letter of the statute, but for reasons not given, but which might be conjectured, the court was of the opinion that the law-makers intended that stock law districts should be as stated by the court.

The law here under review is not a law requiring the fencing of live stock, but for an entirely different purpose. The consolidation of school districts would be frequently impossible, if the Gore Case was controlling. School districts are not formed with any view as to the number of acres, or square miles, that are to be embraced therein, but with a view of accommodating as many educable children as possible. These districts are frequently of irregular shapes, and, when two or more are consolidated, it would be a rare case where they would be compact in form and containing not less than twenty-five full sections of land. Doubtless the legislature required that the consolidated district should embrace not less than twenty-five square miles of territory before a tax could be levied, or bonds issued for the purposes named, because there had to be some limitations upon the cost of conducting the schools, and it was thought that a taxable district of a less area would not ordinarily be able to make the expenditures authorized by the statute. At any rate, we are unable to find anything in the language employed by the legislature which will authorize the court in giving any other than literal construction to the statute.

This being our interpretation of the statute, it follows that the order of the board of supervisors levying the tax was not without authority of law, and the chancery court is without power to enjoin the collection of the tax.

Section 533 of the Code affords the only authority for equity jurisdiction in cases of this class, and the bill of complaint does not bring this case within the statute.

Affirmed.

.WESTERN UNION TEL. CO. v. KENNEDY, SHERIFF ET AL.

[69 South. 674.]

TAXATION. Enjoining collection. Grounds.

Under Code 1906, section 533, providing that the chancery court shall have jurisdiction of suits by taxpayers to restrain the collection of any taxes levied without authority of law, where a railroad commission, after investigating the question of ownership of a telegraph line along a railroad right of way, assessed it against the telegraph company and that company took no appeal to the circuit court by *certiorari*, the chancery court had no jurisdiction to enjoin the collection of the tax so assessed, even though the telegraph company did not in fact own such line, since the judgment of the railroad commission was valid on its face and whether justified or not, the exclusive remedy was by *certiorari* to the circuit court.

APPEAL from the chancery court of Lauderdale county.

HON. SAM WHITMAN, JR., Chancellor.

Bill by the Western Union Telegraph Company, against J. H. Kennedy, Sheriff, and tax collector and others. From a decree for defendants, complainant appeals.

The facts are fully stated in the opinion of the court.

J. B. Harris, for appellant.

In response to the permission of the court to file a brief in reply to the point relied upon by counsel for the appellee, that a writ of *certiorari* issued by the circuit

court is the exclusive remedy for testing the validity of an assessment by the Railroad Commission, my reply is briefly as follows:

Because I thought the remedy pursued in this case was so plainly the proper one that it was not necessary to answer this point raised by the Attorney-General.

This proceeding is one authorized by section 533 of the Code, which is as follows:

"The chancery court shall have jurisdiction of suits by one or more tax payers in any county, city, town, or village, to restrain the collection of any taxes levied or attempted to be collected without authority of law."

This proceeding, the court will note, is against the various tax collectors to enjoin them from the collection of the tax upon the ground that the tax is illegal for the reason that the Western Union Telegraph Company is not the owner of the property.

There is a broad difference between a proceeding to assess property and an attempt to collect taxes within the meaning of this section. This court will not enjoin the assessment of taxes. See, *Railroad Co. v. Adams*, 73 Miss. 648.

The court will note that in that case the attempt was made to enjoin an assessment of property by the railroad Commission.

The case of the Mississippi Railroad Commission against the Western Union Telegraph Company, reported in 65 So. at page 505, was a proceeding by *certiorari* because the contention there was that on the face of the record the assessment made by the Railroad Commission was void for want of authority, for want of power and of jurisdiction. The principle point was that the Railroad Commission had no authority to make an assessment for back taxes except in those cases where the matter was brought before it in a proceeding instituted by the State Revenue Agent, the Commission having attempted to make an assessment in proceeding inaugurated by the

Attorney-General. The speedy remedy for testing this question was by *certiorari*, and the case was taken to the circuit court by a writ of *certiorari*. The circuit court held that the Railroad Commission did not have the power; the Railroad Commission appealed to this court, and this court affirmed it, had the assessment rolls been in hand of tax collectors, an injunction could have been resorted to.

The case before the court now is a case to enjoin the collection of a tax after the assessment has been made upon the ground that the tax is illegal, that the Telegraph Company is not the owner of the property with which it is assessed and never has owned it. The assessment rolls were in the hands of the various tax collectors, and the writ of injunction was issued enjoining them from collecting the tax upon the showing made by the proof taken in the case that the Western Union Telegraph Company was not the owner of the property, and we think this proceeding is clearly authorized by section 533 of the Code, above referred to.

In no case, whether the proceeding be by the Railroad Commission or other taxing authority, can an assessment be enjoined. In this case no question is made or could be made as to the right of the Railroad Commission to assess property. The court must bear in mind that this is not an action for back taxes, but an attempt to collect current taxes, and the Railroad Commission proceeded to make an assessment. The rolls were in the hands of the tax collector. That being the case the proper remedy was by injunction.

In the case in 65 Southern, the power of the Railroad Commission to assess at all was involved, and in that case the proceeding was by *certiorari*, which was a proper remedy. We are not admitting that even in that case the remedy would be exclusive, because we take it that the Telegraph Company would still have had the remedy by injunction if the attempt was made to collect the

taxes. We are at a loss to know what section 533 of the Code meant if it does not mean that.

We think the matter is so clear that we will close by quoting from the case of *Railroad Co. v. Adams*, 73 Miss. *supra*, at page 663. Referring to the section of the Code above referred to, the court says: "But our statute opens the door, and permits a recourse to equity whenever the tax levied or sought to be collected is without authority of law."

The court must bear in mind that that was the case in which the proceeding was by the Railroad Commission, and there was a clear construction of the section, and is a clear announcement by this court that the remedy pursued in this case was the proper one.

The cases cited in the notes to the section in the Code of 1906 clearly illustrate the principle and the distinction.

Geo. H. Ethridge, Assistant Attorney-General, for appellee.

It has been held by the supreme court of this state that *certiorari* lies from the judgment of the Railroad Commission to the circuit court and that the judgment of the Commission may be reviewed in the circuit court on this writ. It has also been held by the court that the court there may not only pass on the legal questions presented but may review any finding or fact where the finding was induced by an erroneous conception of the law. *Gulf & Ship Island R. R. Co. v. Revenue Agent*, 85 Miss. 772, 38 So. 348.

It is my contention that this is an exclusive remedy for testing the validity of an assessment by the Railroad Commission. Under this proceeding, the circuit court, on reviewing the action of the Commission, has power to render the proper judgment if it be apparent on the record and if not to reverse and send back to the tribunal indicating the correct procedure and judgment that

should be reached. It ought to be followed for the reason that it affords protection to both parties, whereas an injunction, if it should find the action of the Commission wrongful, would merely enjoin the proceeding and would not indicate to the Commission the proper judgment that should be entered nor would it itself, in case of dissolution or modification of its original restraining order, enter the proper judgment. The law of injunction nowhere permits the chancery court to enjoin an irregular assessment but it can only enjoin where the assessment is void and the chancery court is not the court provided by the law-making body for the correction and supervision of inferior tribunals but that jurisdiction is confined solely to the circuit court. The powers of the circuit court are broad and ample and the authority to confer jurisdiction on the circuit court is given by the Constitution itself. The Telegraph Company having failed to avail itself of the remedy provided by section 91 within six months is now bound and concluded by the judgment of the Railroad Commission.

In the case of *Jones v. Adams*, 61 So. 420, it was held that a lease is subject to taxation, in that case involving a lease of turpentine or a contract giving the party a right to extract turpentine from standing trees was property subject to taxation, the court saying, at page 420, second column:

“The question before us is whether such turpentine lease is personal property, subject to taxation. It is understood that the lease gives the right and privilege to enter upon land for a term and extract gum or crude products from the pine trees, which is afterwards manufactured into what is known as naval stores. We refer to our opinion this day rendered in the case of *Harrison Naval Stores Co. v. Wirt Adams, State Revenue Agent*, 61 So. 417, in which we discuss such leases, and decide that, where a person is assessed for money invested or employed in the turpentine business, the leases

Brief for appellee.

[110 Miss.]

as set out in the assessment are evidence of the amounts so employed. It will be noted that in the case of *Hancock County v. Imperial Naval Stores Co.*, 93 Miss. 822, 47 So. 177; 17 L. R. A. (N. S.), 693, 136 Am. St. Rep. 561, WHITFIELD, C. J., in delivering the opinion of the court, wherein it is held that turpentine leases are not assessable as real estate, said: "Confining ourselves strictly to the precise point presented for adjudication by this record, which is, merely and simply, whether this instrument passes any interest in the land as land, and therefore assessable as land, we say that it does not." It will be seen that turpentine leases cannot be assessed on the land roll, and be taxed as such an interest in land as amounts to real property. Now, is it not property? It is subject to ownership, it has a value, and it may be bought and sold. It seems clear to us that it is property; that from its very nature it is personal property. The lease, or right or privilege, which is owned by appellant, being personal property, is subject to be taxed as such in Harrison county, and therefore should have been assessed on the personal roll of that county.

We believe that it was appellant's duty, under the requirements of section 4264 of the Code of 1906, in making out and delivering to the assessor a true list of all his taxable personal property, to have included this turpentine lease under the heading provided in the form of the list prescribed in section 4270, of the Code of 1906, "Amount of all other personal property not otherwise mentioned." There is no provision in the law to relieve turpentine leases from taxation by way of exemption. It is certainly the purpose of the state to require of all property its proper proportion of taxes in the plan to provide revenue for the expenses of the government. As the turpentine lease is property with a value, which has not been heretofore assessed to appellant, or any other person, it was not error in the circuit court to decide that it should be assessed to appellant for back taxes."

I think this authority completely answers the authorities cited in the appellant's brief. See also on the same subject, the following: *Harrison Naval Stores Co. v. Adams*, 61 So. 417; *Union Naval Stores Co. v. Adams*, 61 So. 419.

I deem it unnecessary to cite further authorities and submit that the judgment if the chancellor should be affirmed.

Cook, J., delivered the opinion of the court.

Appellant filed its bill of complaint in the chancery court of Lauderdale county, praying that the tax collector be enjoined from collecting certain taxes assessed to appellant on a certain telegraph pole line along the right of way of the New Orleans & Northeastern Railroad Company, between Meridian, in this state and the Louisiana boundary line. The bill alleges that the property in question belonged to the railroad company and not to the complainant; that complainant appeared before the Railroad Commission "and protested that it was not the owner of said poles," but was merely operating a line of wires on said poles under a lease contract with the owners thereof. The tax collector answered the bill, and much testimony was heard by the court upon the question of the ownership of the pole line.

We do not think it is necessary to discuss the question of ownership of the property upon which the assessment was levied, for the reason that this question of fact was threshed out before and determined by the Railroad Commission, if the allegations of the bill of complaint are to be taken as true. Looking to the case made by the bill, it appears that the Railroad Commission had under consideration the assessment of the pole line and to whom it should be assessed. The Commission assessed the property to appellant as owner thereof, and no direct appeal by *certiorari* was taken by appellant, but appellant invoked the aid of the chancery court.

The chancery court was without power to grant the injunction, unless it appeared that the tax collector was attempting to collect the taxes levied "without authority of law." There can be no question that the Railroad Commission possessed the authority to assess the property and to determine the ownership thereof, and it is settled law of this state that the chancery court has no jurisdiction to enjoin the assessment, unless the case made by the bill of complaint brings it within the terms of section 533, Code 1906. The bill of complaint merely states that the Railroad Commission was wrong in deciding that the pole line was the property of appellant, and we are of opinion that this decision cannot be reviewed by a bill in equity. The judgment of the Railroad Commission is valid on its face, and if it was entered without justification in fact the power to review the facts dehors the record cannot be assumed by the chancery court. The exclusive remedy is by *certiorari* to the circuit court. *Railroad Co. v. Adams*, 85 Miss. 772, 38 So. 348.

Affirmed.

POLK v. CITY OF HATTIESBURG.

[69 South. 1005-675.]

MUNICIPAL CORPORATIONS. Vacating streets. Appeal. Bill of exceptions. Statutes.

Under Code 1906, section 80, giving a right of appeal to any person aggrieved by a city's action, and requiring that the bill of exceptions embodying the facts, if duly presented, shall be signed by the presiding officer of the acting board or of the municipal authorities. Where in proceedings to close an alley objections

were filed, and upon issuance by the city authorities of an order closing the alley, the objector presented to the mayor and commissioners a bill of exceptions, which although the mayor approved it as correct, he, under the advice of counsel, refused to sign, unless compelled by mandamus. In such case the appeal to the circuit court was properly perfected, section 80, providing a summary proceeding for appeals of this character, even investing the circuit court with jurisdiction of the whole record, the actual consent of the mayor to the correctness of the bill being sufficient to perfect the appeal, there being no time prescribed by section 80 within which an appeal must be prosecuted, only that the party aggrieved should appeal "to the next term of the circuit court." In such case sections 83 and 95, Code 1906, have no application.

APPEAL from the circuit court of Forest county.

HON. P. B. Johnson, Judge.

On Suggestion of Error. For former opinion see 69 So. 675.

S. E. Travis, for appellant.

It is contended that there was no appeal in this case to the circuit court because no petition for appeal was filed as required by section 95, Code 1906. We fail utterly to grasp the force of this contention, or to see wherein this section has the slightest bearing on the case in hand.

Section 95 of the Code is confined by its very terms to appeals from judgments of justices of the peace and in cases of unlawful entry and detainer and to that class of cases in these two instances where an appeal may be prosecuted without bond. The section has no bearing upon and in no way affects appeals from municipal authorities.

The opinion of this court in overruling the suggestion of error in the *Strong case*, 78 Miss. 565, referred to by counsel, exposes the fallacy of the contention. It is to the effect that where an appellant pursues the course marked out by the statute, his appeal will be sustained, and that is precisely what was done in the instant case. There is no section in the Code that requires a petition 110 Miss. 6.

for appeal in case of an appeal by a private citizen from municipal authorities, and being no such section, there is no law requiring it. Section 80, under which the appeal here was prosecuted, only requires the appellant to "embody the facts and decisions in a bill of exceptions," and this specific thing was done, and, therefore, there can be no question as to the sufficiency of the appeal.

Counsel further contend that the only way to have perfected the appeal in this case was by mandamus, and cite the *Roach case*, 78 Miss. 303, as sustaining this view. That case is wholly unlike this. That involved a bill of exceptions signed by "two disinterested attorneys," and not by the president of the board as the statute prescribed. Of course, there was no bill of exceptions in that case. It is true that the court said mandamus "might have" been resorted to, but that question was not before the court, and even if that statement is the law, it only suggested one remedy that might have been pursued in that case, and that not the most direct one under our statutes and procedure. That course would have required two causes and two litigations instead of one as contemplated by the statutes. Here, we have not a bill of exceptions signed by two attorneys, but one presented at the time and in the form, substance and manner provided by the statute, admitted to be correct by the official whose duty it was to sign it, and then again admitted as true by the demurrer interposed to the petition, and have proceeded with it within the principles of an unbroken line of decisions of this court, some of which were cited in brief in chief, in which was also cited late decisions of this court to the effect that mandamus was not available to the appellant who did not proceed by bill of exceptions as was done in this case. When the appellant did all that the law required him to do to perfect his appeal, no other person's delinquency could defeat it. We respectfully submit that this contention is without merit.

110 Miss.]

Brief for appellee.

D. E. Sullivan, for appellee.

Appellant did not appeal from the ordinance vacating the alley.

Appellant did not appeal in this case from the action of the mayor and board of commissioners in adopting the ordinance in question. Section 80, Code of 1906, provides for appeals by persons aggrieved by a judgment or decision of the board of supervisors or the municipal authorities of a city, town, or village, and the facts and decisions may be embodied in the bill of exceptions, which shall be signed by the person acting as president of the board or of the municipal authority. This section of the Code does not require a bond in such appeals. It was held in the case of *Monroe County v. Strong*, 78 Miss. 565, that the appeal provided for in this section could be prosecuted without a bond. Section 95, Code of 1906, is as follows:

“In all cases where an appeal is desired without bond, from a judgment of a justice of the peace, and in cases of unlawful entry and detainer, by parties who are not required to give bond therefor, a written demand for the appeal shall be filed, in lieu of the bond required of others, within the time allowed for appeal in such cases.” The supreme court strictly enforces this section and held in the case of *Town of Purvis v. S. E. Rees*, 99 Miss. 636, that a justice of the peace who marked such a petition for appeal filed the tenth of November, 1908, was incompetent to impeach such endorsement by showing that the petition was really filed on the sixteenth of November, 1908.

This record nowhere shows that a petition for an appeal was ever filed by the plaintiff, and in fact none was ever filed.

The only thing the plaintiff did was to present his bill of exceptions to the mayor on the fourth of January, 1912, and thereafter on the tenth day of January, 1912, filed his petition in the circuit court praying for a writ

of *certiorari* and obtained the order of the judge for the writ on that day.

Section 80, Code of 1906, providing appeals on bills of exceptions from boards of supervisors and municipalities, and constitutes the circuit court an appellate court and limits its right to hear the case to the matters presented by the bill of exceptions. If a petition for an appeal is not filed as required by law, then no appeal has been taken, even though the bill of exceptions had been duly signed and the circuit court is without jurisdiction to hear and determine the case.

STEVENS, J., delivered the opinion of the court.

Counsel for appellee suggest error in the majority opinion heretofore rendered, and earnestly contend: First, that "the court had no jurisdiction of this case, because an appeal was not taken from the decision of the mayor and commissioners," and, second, "the circuit court cannot sign the bill of exceptions for the mayor." The case is within narrow margins, and the holding of this court as expressed in the majority opinion may have been to some extent misunderstood by counsel. It is argued that sections 95 and 83 of the Code, construed together, required that appellant should perfect his appeal from the decision of the city commissioners within five days, whereas no appeal was taken within said time.

There is no time prescribed by statute within which an appeal under section 80 of the Code of 1906 must be prosecuted. It is contemplated by section 80 that the party aggrieved should appeal "to the next term of the circuit court" by embodying the facts and decisions in the bill of exceptions signed by the person acting as president of the board or of the municipal authorities, and that the taking of a bill of exceptions in accordance with the statute operates at once as an appeal. It thereupon becomes the duty of the clerk to transmit the bill of exceptions to the circuit court on or before the first

day of the next succeeding term, or at once if the court be in session. The perfecting of the bill of exceptions is the perfecting of an appeal; and there is no time prescribed for giving a bond or presenting a written petition or demand for an appeal. Sections 95 and 83, in our opinion, have no application to an appeal provided for by section 80 of the Code.

It was not our intention to hold that the circuit court can ascertain for itself whether the proposed bill states the facts and decisions of the board of commissioners, or to dispense with the requirement of the statute that the bill shall be approved by the president of the board of municipal authorities. We simply held and here re-iterate that the demurrer in this case admitted that the bill of exceptions in question had, in fact, been tendered to the mayor, and that the mayor had, in fact, approved the bill as one correctly embodying the facts and decisions of the city commissioners, but that the mayor, upon legal advice, had declined to affix his signature, unless compelled to do so by mandamus. The mental assent of the mayor fixed conclusively the correctness of the bill; there was then nothing further to be done by appellant. He had, so far as he was concerned, perfected his appeal. It was then the absolute duty of the mayor to affix his signature.

Section 80 provides a summary proceeding for appeals of this character, even investing the circuit court then in session with jurisdiction of the whole record. To require appellant, therefore, under the facts of this record, to prosecute a mandamus suit, would be contrary to the purpose and intent of section 80, and would impose upon appellant a great hardship. It was never the purpose of the legislature to require litigants to travel a long and circuitous road to justice. If the bill in question was incorrect, and was not, in fact, approved by the mayor, a different question would present itself. This case is differentiated from the case of *Roach v. Tallahatchie County*, 78 Miss. 303, 29 So. 93, in two essentials: In the

Roach Case the president refused to sign the bill, and it was not shown that he, in fact, ever approved the bill by mental assent or otherwise; and again the bill in that case was signed by two attorneys under a procedure that had no application to appeals of this character. In short, the appellant in the Roach Case did not pursue the course prescribed by section 80, but was led astray by section 737, Code of 1892. In the instant case appellee, through its mayor, admitted that the bill presented was correct, and mentally approved the same; and the demurrer in the circuit court reiterates this admission. If, then, the bill was correct, and was, in fact, approved, then appellee should not be heard to question the appeal in the face of such admission, and thereby take advantage of the wrong of its chief officer charged with the duty of seeing that the bill of exceptions was, in fact, approved and signed, and the record promptly removed to the appellate court.

The suggestion of error is therefore overruled.

Overruled.

SMITH, C. J., adheres to the views expressed in his former opinion.

WILCZINSKI v. WATSON.

[69 South. 1009.]

1. MORTGAGES. Foreclosure by sale. Defective notice. Statute. Appeal and error. Review. Questions first raised on appeal.

Where a sale *in pais* is made by a trustee under an instrument conferring a power of sale upon him under certain prescribed conditions, a substantial compliance with the mode, manner and time prescribed is essential to pass the title, and any disregard of them in any important respect will vitiate the sale.

110 Miss.]

Brief for appellant.

2. SAME.

Code 1906, section 2772, declaring that the sale of mortgaged lands shall be advertised for three consecutive weeks preceding the sale, and that no sale shall be valid unless so advertised, regardless of any contract to the contrary, does not take away the right of the parties to contract for a longer period of advertisement, and where a trust deed provided for thirty days advertisement of sale, a sale made after only twenty-two days of publication of notice of sale did not comply with its terms and a sale was not valid in such case.

3. APPEAL AND ERROR. Review. Questions first raised on appeal.

Where complainant's bill to recover the amount bid by defendant at a trustee's sale foreclosing a deed of trust recited that the advertisement of sale was made according to law for three consecutive weeks, and the deed from the trustee contained the same recital, in such case complainant showed by his own pleading and proof that the sale was not advertised for thirty days as required by the deed of trust, so that such question was not raised for the first time on appeal.

APPEAL from the chancery court of Washington county.
HON. E. N. THOMAS, Chancellor.

Bill by Lamar Watson, Trustee, against Joel Wilczinski. From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

Campbell & Cashin, for appellant.

The trust deed provides that the "sale shall be made after first advertising the said land for sale by publishing a notice thereof for thirty days, giving in each of said notices the time, place and terms of said sale, and by posting a copy of said notices at the front door of the courthouse."

In other words, the trust deed requires thirty days of advertising by publishing and posting of notice of the sale, before the sale shall be made. As shown by the testimony of Lamar Watson, Trustee, and Exhibits Numbers 2 and 3 thereto, the Notice of Sale was posted at the courthouse door on the ninth of February, 1912,

and the first publication of said notice was made on the tenth of February, 1912, and the sale was made on the fourth day of March, 1912. So then, it clearly appears upon the face of the record that the notices of sale were only published and posted twenty-two days before the sale was made.

A sale under a trust deed, made without notice required by the terms of the trust deed, is void, and a trustee's deed under such a sale conveys no title to the purchaser. 28 Am. and Eng. Ency. of Law, page 788.

While this is not the rule in some jurisdictions, it is unquestionably the law in Mississippi. See 28 Am. and Eng. Ency. of Law, page 786; *Walker v. Brumgard*, 13 Smed. & M. 763; *Wrightman v. Doe*, 24 Miss 681; *Wade v. Thompson*, 52 Miss. 367; *Graham v. Fitts*, 53 Miss. 307, and *Enochs v. Miller*, 60 Miss. 19.

In the latter case, CHALMERS J., delivering the opinion of the court says: "Where a sale *in pais* is made by a trustee under an instrument conferring a power of sale upon him under certain prescribed terms and conditions, a substantial compliance with the mode, manner and terms prescribed is essential to pass the title, and any disregard of them, in any important respect, will vitiate the sale. The making of the deed is *prima-facie* evidence that the sale was properly made, and will throw upon him, who attacks or resists it, the burden of showing the contrary.

In the present case the defendants assumed and successfully met this burden by proving that the sale took place upon twenty-six days' notice, instead of thirty, as was required by the deed of trust under which it was made. The court below properly held that the purchaser acquired no title, "citing various authorities, among them those above mentioned."

In the case at bar, while the decree recites that the sale in question was made "in all respects in conformity with the trust deed of which it was made and the statute for such cases provided," this recital of the decree is

plainly contradicted by the record. The trust deed itself, which is filed as Exhibit Number 1 to the testimony of Lamar Watson, shows plainly upon its face that it required thirty days' advertisement before a sale of the property could be made, and Mr. Watson's testimony shows that he posted the notice on the ninth day of February, 1912, and that the notice of the sale was published in the Greenville Times, the first time, on February tenth, 1912, and that he made the sale on the fourth day of March, 1912, only twenty-two days after the first publication of the Notice of Sale.

We presume Mr. Watson must have overlooked the terms of the trust deed, requiring thirty days' advertisement, and supposed that it only required three weeks' advertisement, because that is what the statute (Sec. 2772 of the Code, and the amendment thereto by chapter 180 of the Acts of 1908), require.

Of course, we do not suppose that the chancellor, himself, examined the trust deed and advertisement, to see whether or not the trustee had, in fact, given the notice required by the terms of the trust deed. An inspection of the trust deed and advertisement, themselves, plainly discloses that the notice required by the terms of the trust deed was not given.

Therefore, under our decisions, the sale was absolutely void. This being true, the bidder cannot be required to accept the trustee's deed, and to pay the amount of his bid. The trustee's deed is absolutely void and conveys no title.

We do not understand that section 2772 of the Code changes the law requiring the notice prescribed by the terms of the trust deed to be given, except where the trust deed requires less than three weeks advertisement. In such cases, the sale must be advertised for three weeks preceding the sale, notwithstanding the fact that the trust deed provides for advertisement for a shorter time. If the trust deed requires advertisement for more than three weeks, then the terms of the trust deed, as to the

notice and advertisement, must be followed. This does not conflict with the statute, but would be in harmony with it and with the terms of the trust deed.

Percy Bell, for appellee.

The case of *Bomar v. West*, 28 S. W. 519, cited by counsel for appellant, we submit is not in point. In that case the trust deed provided that "the sale should be made at the instance of the payee or legal holder of the said notes." In the present case the deed of trust expressly provides that "if default is made in the payment of any one of the notes that the owner and holder thereof may direct the trustee to foreclose." That this must have been their intention is shown by the paragraph of the trust deed providing for the substitution of the trustee, which plainly says that the trustee can only be substituted by the owner and holder of the notes—meaning all of them. The difference is very evident.

Furthermore, in the *Bomar* case only one of the notes had fallen due; in the case at bar all of them were past due and there was no necessity of a declaration of their being due.

The sale was void because not advertised for thirty days. In this connection we would direct the attention of the court to the authority just cited, and to *Wightman v. Doe*, 24 Miss. 681.

The court will observe that this sale was made in strict accordance with the statute, which forms the law of the state of Mississippi. We are of the opinion that this statute of Mississippi prescribes the method of sales made under trust deeds and that a sale made under it is legal. The contention of appellant is that there was not thirty days' notice given as stated in the trust deed but it is admitted that the sale was in every respect, save this, in accordance with the terms of the trust deed and was in every way in accordance with the statute. We submit that the irregularity as to time is an immaterial irregularity at best and we refer the court to 27 Cyc.

1493-B and note 52 thereunder. In addition thereto we would again refer the court to the authorities cited at the beginning of this section; that Mr. Wilczinski is not a person to complain of this irregularity and that no complaint is made by those who have the right, if any, to complain.

We submit that the statute governs the method of foreclosures and we refer the court to 27 Cyc. 1450-B, in which the statement is made that statutes similar to ours "must, of course, be fully complied with in order to effect a valid foreclosure."

Replying to the authorities quoted by counsel for appellant in support of his position that sufficient notice was not given, we would state that all of these cases were decided when Mississippi had no such statute as she now has fixing the method of foreclosure of trust deeds.

STEVENS, J., delivered the opinion of the court.

Appellee, as complainant in the court below, exhibited his bill in the chancery court of Washington county against appellant, seeking recovery of the sum of six hundred and ninety dollars and interest, bid by appellant at a trustee's sale foreclosing a deed of trust in which the appellee is the trustee. Isaiah and L. C. Ballard, on March 12, 1910, executed to Lamar Watson, trustee, a deed of trust conveying a certain parcel of land in the city of Greenville to secure three promissory notes in favor of one Allen Caldwell. The trust deed provides that:

If default shall be made "in the payment of said notes at maturity, or any one of them, then the owner and holder may declare all of said notes due and payable and may direct the trustee herein named, or his successors, to foreclose this trust deed by first advertising said land for sale by publishing notices thereof for thirty days, giving in each of said notices the time and terms and place of the sale, and by posting a copy of said notices at the front door of the courthouse in said county of

Washington, and sell said property to the highest bidder for cash between the hours prescribed by law for sheriffs' sales."

The trustee, at the request of the holder of the first of the notes secured, and after all of the notes were due, advertised the property for sale by posting a notice of the sale at the front door of the courthouse and by publishing the notice of sale for three weeks in the Greenville Times. These notices were published on the tenth, seventeenth, and twenty-fourth days of February and the first day of March, 1912; and the sale was made on March 4, 1912. Appellant appeared at the sale and bid, in the name of the Delta Cotton Company the sum of six hundred and ninety dollars; and the lands embraced in the trust deed were struck off and sold to the Delta Cotton Company. Some time thereafter the trustee tendered to appellant a deed signed and acknowledged by the trustee, conveying the property to the Delta Cotton Company; and this deed appellant declined to receive and declined to pay the amount of his bid. The trustee thereupon readvertised the property to be sold July 15, 1912, but abandoned his purpose to resell and did not complete the second publication. On the contrary, he filed the original bill in this cause tendering his trustee's deed as an exhibit and prayed that appellant, doing business under the name of the Delta Cotton Company, be required by decree of the court to perform his contract, to accept the deed and pay the amount bid. The cause was finally set down for hearing on bill, answer, and proof; and a decree was entered in accordance with the prayer of the bill. From this decree appellant appeals.

One point argued by counsel for appellant will dispose of this appeal. The trust deed requires thirty days' advertisement of the notice of sale; and the pleadings and proof show that the notice was posted at the courthouse door on the ninth of February, 1912, and that notice was first published in the newspaper on the tenth of February, 1912. The sale was made on the fourth day of March

thereafter. It appears from the face of the record that there were only twenty-two days' publication before the sale was made. Whatever the ruling may be in other jurisdictions, our court is committed to the holding that:

"Where a sale *in pais* is made by a trustee under an instrument conferring a power of sale upon him under certain prescribed terms and conditions, a substantial compliance with the mode, manner, and terms prescribed is essential to pass the title, and any disregard of them in any important respect will vitiate the sale." *Enochs v. Miller*, 60 Miss. 19.

In the *Enochs* Case, the trust deed required thirty days' notice and the sale took place upon twenty-six days' notice. CHALMERS, J., in the opinion says:

"The court below properly held that the purchaser acquired no title."

It is argued by counsel for appellee that this case of *Enochs v. Miller*, *supra*, was decided before the enactment of section 2772 of the Code of 1906. This statute, among other provisions, declares that:

"Sale of said lands shall be advertised for three consecutive weeks preceding such sale, in a newspaper published in the county, or if none is so published, in some paper having a general circulation therein, and by posting one notice at the courthouse of the county where the land is situated, for said time. No sale of lands under a deed of trust or mortgage shall be valid unless such sale shall have been advertised as herein provided for, regardless of any contract to the contrary. An error in the mode of sale such as makes the sale void will not be cured by any statute of limitations, except as to the ten years statute of adverse possession."

It is contended that this statute was complied with in the instant case, and that a compliance with the terms of the statute is all that is required. We do not understand that this section takes away the right of the parties to contract for a longer period of advertisement than that required by the statute. If the trust deed requires less

than three weeks' advertisement, its provisions would then be in conflict with the statute, and the terms of the statute must and would prevail; if the trust deed, however, requires more than three weeks' advertisement, then the terms of the trust deed as to notice and advertisement must be followed and complied with in accordance with the contract of the parties. In this instance the contract of the parties provides for thirty days' notice, and thirty days' notice is not at all in conflict with the statute but in harmony with it. The statute was evidently enacted in the interest of debtors and for the security of land titles acquired under foreclosure. It was a common practice before the enactment of the statute to execute deeds of trust providing for ten days' notice of sale and on such short notice to foreclosure trust deeds on valuable tracts of lands and the homes of humble debtors. The statute was designed, among other things, to give due publicity to sales under deeds of trust by requiring a reasonable notice of sale, the posting of one notice at the courthouse door of the county where the land is situated, and publication in a newspaper of that county—wise provisions calculated not only to give due notice to the owner of the lands but also to prospective bidders.

The statute by its language does not make unlawful further and additional provisions agreed upon by the parties providing for a longer period of advertisement or additional precautionary methods in the interest of the mortgagor. The right to contract is sacred, and the parties should be left free and untrammelled in their right to agree upon and incorporate any lawful provisions not in conflict with the statute in question. The deed of trust itself is a contract between the parties, and the purpose of the statute in question is merely to enforce the contract which the parties have entered into and to enforce it in the particular way which the lawmakers deemed wise and best. Inasmuch as the advertisement in the instant case was less than that contracted for and provided by the

trust deed itself, we are constrained to hold that the sale by the trustee was void; and his deed would convey no title. This being true, the court should not compel the purchaser to buy a lawsuit or to accept an invalid deed.

"Through there is a presumption in favor of the validity and regularity of a completed sale, the purchaser is affected with the consequences, and therefore with the knowledge of all material irregularities incident to the exercise of the power." 28 Am. & Eng. Enc. of Law (3d Ed.) p. 820.

Counsel for appellee contend that this question is raised for the first time on appeal and on that account the court should not reverse this case. The bill, however, recites, "said advertisement being made according to law for three consecutive weeks, in the Greenville Times," and the trustee's deed exhibited with the bill likewise recites, "after advertising the hereinafter described property for three consecutive weeks," and the proof removes all doubt as to the period of advertisement and shows affirmatively twenty-two days' notice. Complainant is therefore in the attitude of showing by his own pleadings, exhibits, and proof, the fatal irregularity complained of.

Let the decree of the court below be reversed, and the bill dismissed.

Reversed.

SMITH, C. J., (dissenting). I do not think that the method to be pursued in selling land under deeds of trust is subject to regulation by contract, for in my judgment section 2772 of the Code as amended by chapter 180 of the Laws of 1908 prescribes the exclusive method for so doing. If the advertisement of the sale may be partially regulated by contract, the other things which the statute provides must be done in making the sale may also be so regulated and this I am sure was not the intention of the legislature. A sale of land under a deed of trust, for obvious reasons, will be valid even though advertised for

a longer time than required by the statute; but it does not at all follow that the parties by contract can make an advertisement for such length of time necessary.

KINGSBURY *et al* v. GASTRELL'S ESTATE.

[69 South. 661.]

1. LIMITATION OF ACTIONS. *Compensation of period of limitation. Death of debtor. Gifts. Acts constituting. Estoppel. Foreclosure.*

It is a general rule of the law, that where a cause of action against a person has not accrued at the date of his death, the general statute of limitations does not commence to run until there is an administration of his estate, in the absence of legislation to the contrary.

2. GIFTS. *Acts constituting.*

Where K. died intestate in 1901, owning a homestead upon which was a deed of trust securing notes of himself and wife, the last and all of which notes matured in October 4, 1903, G. the aunt of K's wife, shortly after all the notes reached maturity, purchased such notes, and stated to a third party, that she had bought them in order to save the homestead for K's wife and child and to give them a home; that the wife would never be able to pay them, and she would give them to her. G. died in 1913, leaving a will which made no reference to the notes, which were in her possession at the time of her death and were found among her valuable papers. In such case the holding of the chancellor that the notes were never given away by G. in her lifetime, was not manifestly wrong; the gift never having been consummated by delivery of the notes and a cancellation of the indebtedness.

- . ESTOPPEL. *Foreclosure.*

In such case G. if living would not have been estopped from foreclosing these notes, nor was her executrix estopped.

APPEAL from the chancery court of Adams county.

HON. J. S. HICKS, Chancellor.

Petition of Maude E. Barton, executrix of Mrs. L. E.

Gastrell, deceased, against Ruth S. Kingsbury and others to construe the will.

From a decree, Ruth S. Kingsbury appeals.

The facts are fully stated in the opinion of the court.

Brandon & Brandon, for appellants.

First: Said chancery court erred in its decree of August 2, 1913, in holding that the notes of Horace E. Kingsbury and Ruth S. Kingsbury in question are not barred by the statute of limitations.

In response to our contention the counsel for appellees will of course reply on the doctrine of *stare decisis*. We are taking this appeal with a full knowledge of the case law on the subject in point, and are asking this court to disregard the same and establish a new rule.

We are aware that the general rule of law, broadly stated, is that where a cause of action against a person has not accrued at the date of his death, the general statute of limitations does not commence to run until there is an administration on decedent's estate—in the absence of legislation to the contrary. And, on the other hand, if the cause of action accrued in decedent's lifetime, his death (in the absence of legislation to the contrary) does not suspend the running of the statute until administration is taken out. See 25 Cyc. 1278 (2), and 17 Cyc. 930, and note 53.

We are aware that this honorable court has theretofore recognized and followed the above rule in a number of cases. See: *Abbott v. McElory*, 10 S. & M. 100; *Bingaman v. Robertson*, 25 Miss. 501; *Pope v. Bowman*, 27 Miss. 194; *French v. Davis*, 38 Miss. 218; *Buckingham v. Walker*, 48 Miss. 609; *Sively v. Summers*, 57 Miss. 712; *Jennings v. Pearce*, 14 So. 318. If the court is unwilling to alter the rule hitherto followed, we are frank to admit that our first assignment of error is not good.

But what is the reason for the rule that the general statute of limitations does not begin to run in this and 110 Miss.—7.

similar cases until administration is taken out. Because, as laid down in Cyc., "until that time a cause of action has never accrued, there being no one who could be sued."

We suggest that this rule does not rest upon a sound foundation in Mississippi, because under our statutes, after the expiration of the first thirty days within which the next of kin has the prior right to apply for administration upon a decedent's estate, any creditor has a right to apply for and receive administration, or, if a creditor does not care to qualify himself, after sixty days he can ask that letters be granted to the county administrator. If a creditor, who is presumably the person most interested in the collection of his claim, chooses to sleep upon his rights, to abstain from taking steps to subject the decedent's estate to the payment of his claim, why should he be given the benefit of the rule which the courts have established, and which in this state does not rest upon any statutory provision, especially when in so many cases the application of the established rule, after the lapse of years, may (as in the present instance), work a hardship upon the dependent widow and children of the deceased, to the extent even of depriving them of a home.

As shown by the record, Horace Kingsbury died in 1901, and no administration was ever taken out on his estate. After the lapse of twelve years, in 1913, three promissory notes secured by mortgage on his home, came into the hands of the executors of his aunt, Mrs. Gastrell, who had purchased them from a former holder and with the intention of protecting his widow from that holder and in fact of giving them to her. Had Mrs. Gastrell desired to bring suit upon said notes or to subject the estate of Horace Kingsbury to the payment thereof, she could have qualified as his administratrix or had some one else do so. Even this was unnecessary in the present instance, for she could have foreclosed the deed of trust without administration.

Not one of our several statutes of limitations contains any provisions that it shall not operate for the benefit of the estates of decedents till administration is taken out. If our law-makers desired such restriction, would it not be embodied in the law? Is it not the fact that such restriction was not contemplated, and therefore the right of creditors to take out administration was given?

We therefore ask the court to consider in this case (as it has occasionally done in other cases), a departure from the doctrine of *stare decisis*, and a modification of the rule heretofore followed. We ask the court to hold that in this case and in further cases that creditors of decedents are chargeable with a reasonable amount of diligence in collecting their claims, and with the duty of availing themselves without unreasonable delay of the provisions of the law intended to enable them to do so; and to modify the established rule by holding that if a person dies owing a note or other debt which does not become due till after his death, that if some one has not already been appointed to administer the estate, yet nevertheless the statute of limitations commences to run immediately after thirty days from the date the note or debt became due—and for the reason that the creditor holding the note has the right to apply for and take out administration after thirty days from decedent's death, if those first entitled have not already done so.

The establishment of such rule would work a hardship on no one; it would obviate the hardship which often occurs, as in the present case; and we respectfully submit under the statutes of Mississippi would readily bear the test of the "rule of reason."

Upon second Assignment of Error.

Second:—The court erred in decreeing that said notes were never given by the testatrix, Mrs. Gastrell, to any one, but constituted a part of her estate at her death, and are now assets thereof.

This second suggestion of error presents a question of fact rather than of law. What was the manifest inten-

tion of Mrs. Gastrell, as disclosed by the record. Her nephew, Horace Kingsbury, died in debt, leaving notes secured by a deed of trust on his modest home. These notes were held by a stranger. They had not matured at the date of his decease. Subsequently Mrs. Gastrell purchased these notes, but not till after the last one had matured, after the time when Mrs. Merrick had a right to foreclose the deed of trust on the home. Why did Mrs. Gastrell purchase these notes? She told her brother, Mr. A. T. Gastrell, that she did it to save the home for Ruth Kingsbury (her nephew's widow) and his child Lucy—the namesake of Mrs. Gastrell. It is further admitted by the executors of Mrs. Gastrell, that in her lifetime she said she did not intend to enforce said notes and deed of trust, and that she intended to give up said notes and security. And when she died twelve years after the death of Horace Kingsbury, she had never attempted to collect the notes or to foreclose the deed of trust, and had never taken out any administration upon his estate. During all this time the widow and child of Horace Kingsbury, his sole heirs at law, continued and still continue to live in the little home he left, claiming it as theirs and feeling safe in its ownership and possession; and considering that their aunt, Mrs. Gastrell, had given them the debt thereon, and that they would never be disturbed.

But Mrs. Gastrell died, and her executors found the notes in question among her papers. They were not mentioned in her will, although that will goes into the most minute detail in disposing of all her property, both real and personal. Manifestly she did not consider these notes any longer as property to be disposed of by will. Manifestly she must have considered that her expression of purpose that she bought the notes for the protection of her nephew's widow and child, that it was her intention to give them the debt; her failure for so many years to foreclose the deed of trust or to take out administration on the estate of Horace Kingsbury; manifestly she must have

considered that all this constituted a gift of the indebtedness to those for whose benefit she purchased the notes.

We respectfully submit to the court that under the facts of the case our second assignment of error is good, and that had the learned chancellor not erred, he would have decreed that whilst physical possession of the notes was not parted with, that nevertheless Mrs. Gastrell had given and forgiven the debt unto her nephew's widow and child, and that at her death said notes did not constitute any part of her estate or the assets thereof.

W. C. Martin, for appellee.

The first assignment deals with the point as to whether the notes in question, and deed in trust securing them, were, or are, barred by the statute of limitations, or any statute of limitations.

That they are not barred is admitted by the candid brief on the other side—counsel there citing the several cases in our jurisprudence which have crystallized the law in Mississippi for these many years to the effect that unless a debt is due by a decedent at the time of his death no statute of limitations will run against it in favor of his estate until administration is had upon it—the plain reason being that until then no person is in being who could be sued by the creditor. Such being the law in this state, and having been so from the beginning, counsel ask this court to abandon the salutary rule of "*stare decisis*," and overturn a settled rule of property in order that their client may escape payment of a debt which has, admittedly, never been paid, but against which the statute of limitations is invoked. We cannot conceive of the court's doing this. Counsel suggests that the rule does not rest upon a solid foundation in Mississippi, because a creditor, if others primarily entitled to administration fail to take out letters, has the legal right to apply for letters himself, and, if he does not do this, counsel further suggest, he has slept upon his rights, is guilty of laches, etc. If the law had formerly, when the decisions adverse

to their position were rendered, been such that creditors did not possess the right to sue out letters of administration upon the estates of their debtors, then there might, possibly, be something in the argument of counsel, but, unfortunately for him, that is not so. As far back as the year 1821 it was the law in this state that, after lapse of a certain time for action by those who were first entitled, a creditor could obtain administration upon the estate of his debtor by applying to the proper court.

See Chapter 49 of Hutchinson's Mississippi Code, section 54, on page 655—this chapter being a copy of an Act dealing with Testament and Administration, passed in November, 1821.

And the law has remained practically unchanged from that day to this—so that the supreme court, in all those cases cited by counsel for appellant as establishing the law against him, did so with full knowledge that a creditor could get administration if the relatives failed to do so. This disposes of the contention of appellants on the statute of limitations. Our jurisprudence upon the point is in line with that of other states and is decisive. The suggestion that this court would proceed to legislate upon this subject and establish by its decree an arbitrary period from which the statute should begin to run, to-wit: thirty days after the debt fell due, is somewhat startling to the legal mind; we submit that this suggestion would better be directed to the next session of the legislature than to this court, whose duty it is to construe, interpret and apply laws, not to make them. While the facts of this case may make it a "hard case," yet that does not justify a departure from settled law. Such was the opinion of the chancellor, now deceased, who rendered the opinion, or rather decree, from which the appeal is taken, and he was a man of singularly kindly nature. While appellants may be deprived of a home, yet it must be remembered that they have enjoyed the home for very many years, and that home was never paid for, apparently. Upon the second assignment of error—that the court

erred in holding that there never had been a gift of these notes and their mortgage security to any one by the testatrix—the record shows that appellants have no better case than on the first assignment. It is perfectly manifest that Mrs. Gastrell never gave these papers, or the debt they represented, to any one—she may have intended to do so but it rested there, in intention, and never was ^{debt} ^{not} ^{to} ^{be} ^{sum-} ^{med} ^{by} ^{deliv-} ^{ery} ^{of} ^{the} ^{debt}, through the notes ^{and} ^{deed} in trust; on the contrary she kept these papers; they were found in her possession among her other papers. She did save the home for many years by purchasing the notes and mortgage, probably at a time when it would have been foreclosed had she not done so, but had she really given up the debt she would undoubtedly have turned over the notes to Mrs. Kingsbury and had the mortgage cancelled—she did not do this, but kept control of the entire debt until her death and then, no mention being made of it in her will, the notes became assets in the hands of the executors. However much Mrs. Gastrell may have said along the line of her intentions as to the notes and security, the evidence shows that there never was a gift *inter vivos*; at the most there was a purpose expressed to make a gift, but unfortunately the purpose was never effectuated by doing those things without which, in law, no gift was made. Mrs. Gastrell died, the owner of the notes. In this case it would be futile to attempt to read the mind of the testatrix and deduce an inference of a completed gift from the expression of an intention to make the gift. She kept the papers for years. She had every opportunity to give them up to Mrs. Kingsbury, she did not do so, and the necessary consequences follow: had she put these notes in possession of some one for the widow and child of her nephew, that would be sufficient, but that was not the case here. *Beaver v. Beaver*, 6 L. R. A. 403, and notes.

Mere intention to give is not a gift. *Ridden v. Thrall, Admr.*, 11 L. R. A. 684, footnote on page 685. 20 Cyc, page 1195, 4., also same book page 1193, C.

STEVENS, J., delivered the opinion of the court.

The executrices of the last will and testament of Lucy E. Gastrell, deceased, presented in the inventory and appraisal of the personalty of the estate, being administered upon in the chancery court of Adams county, certain promissory notes executed by H. E. and Ruth Kingsbury, payable to the order of the makers or bearer and indorsed by the makers and secured by deed of trust on the homestead of said H. E. Kingsbury. The inventory recites that:

“These notes are separate debts unless barred by the statute of limitations. H. E. Kingsbury, deceased, was the husband of said Ruth Kingsbury, and died before the maturity of any of said notes, and no administration has ever been taken on his estate. The notes are reported by the executrices, they having been found among the effects of decedent after her death, but said Ruth Kingsbury claims that said notes are barred.”

The Ruth Kingsbury mentioned, widow of H. E. Kingsbury, deceased, and one of the joint makers of said notes, is also one of the executrices of the will.

Thereafter, the executrices presented a petition to the court asking for a construction of certain features of the will, setting forth the listing of said promissory notes and the objection or protest of said Ruth Kingsbury, and praying that process might be issued to the parties in interest and proper issues made up to determine whether the said notes belonged to the estate. This petition, furthermore, alleged that during the lifetime of said decedent, Lucy E. Gastrell, she stated that she did not intend to enforce collection of said notes and trust deed securing the same. The petition was answered by Mrs. Ruth Kingsbury individually and for her minor child, Lucy Gastrell Kingsbury; and thereupon the controversy was heard upon said petition, answer, and agreed statement of facts.

The inventory and petition represent that the notes in question were in the possession of decedent at the time of her death and were found among her valuable papers. The answer of Mrs. Kingsbury charged, among other things, that Mrs. Gastrell was guilty of laches in failing to foreclose said deed of trust securing the notes; that no administration was ever taken out upon the estate of H. E. Kingsbury, deceased; that at the death of her husband, H. E. Kingsbury, the mortgaged homestead descended to her and her minor child as their exempt home, and had been occupied by them as a home without any expectation on their part of ever having the said notes to pay. The agreed statement is as follows:

"It is admitted that said Horace E. Kingsbury died intestate on March 16, 1901, leaving as his sole heirs at law his widow, Mrs. Ruth Kingsbury, and their minor child, Lucy Gastrell Kingsbury; that the last and all of the notes in question reached maturity on October 4, 1903; that the three notes in question were purchased by her aunt, Mrs. Gastrell, from the former holder, Mrs. Merrick, on October 14, 1903, after all had reached maturity; that said notes were secured by deed of trust on the family residence and homestead of said Horace E. Kingsbury; that said property was inherited by his said wife and daughter as his sole heirs at law, and ever since his death has been used and occupied by them as a residence; that just after she purchased said notes said Mrs. Lucy E. Gastrell stated to her brother-in-law, Mr. A. T. Gastrell, that she had bought the notes on Horace's home in order to save it for Ruth and Lucy, and that she bought them to give them a home, and that Ruth would never be able to pay the notes, and she would give them to her."

The will of Mrs. Gastrell, who died January 21, 1913, made no reference whatever to these notes.

The chancellor decreed that the notes were not barred by the statute of limitations, and that the testatrix had not, as a matter of fact, given the notes to any one; but

the same constituted a part of her estate at her death, and the executors were ordered to deal with the same as assets. This appeal is from the decree of the chancellor so holding.

Counsel for appellants frankly concede the general rule of law that, where a cause of action against a person has not accrued at the date of his death, the general statute of limitations does not commence to run until there is an administration of his estate, in the absence of legislation to the contrary. They ask that we disregard the previous holdings of this court on this question and to establish a new rule. Our court in as early a case as that of *Abbott v. McElroy*, 10 Smedes & M. 100, through Chief Justice SHARKEY, declared the rule in unmistakable language as follows:

“But, if the debt was not due at the time of his death, the statute does not begin to run until there is an administrator, because until then a cause of action has never accrued, there being no one who could be sued.”

This holding has been reaffirmed in repeated decisions of our own court; and the legislature, with full knowledge of these decisions, had not seen fit to enact a new rule. Our present statute of limitations must therefore be construed in the light of the many decisions of our court. The principle is now too thoroughly embedded in the jurisprudence of our state to be changed by what would be more properly termed “judicial legislation.”

Under our liberal statutes the next of kin or any creditor, after the expiration of thirty days from the death of any party whose estate should properly be administered upon, has the right to force administration; and if the beneficiaries of the estate, charged primarily with the duty of seeing that the estate is lawfully administered upon, elect to use the property of the estate and to refrain from taking steps toward the payment of just debts under the supervision of the proper tribunal, they are then in no attitude, in our judgment, to complain of any hardship occasioned by many years of delay.

The second assignment of error complaining of the decree of the chancellor holding that the said notes were never given away by the testatrix in her lifetime presents a question of fact rather than of law; and upon the pleadings and facts we are not prepared to hold that the chancellor was manifestly wrong. The gift was never consummated by delivery of the notes and a cancellation of the indebtedness.

There is likewise no merit in the contention on the third assignment of error that Mrs. Gastrell herself would be estopped to foreclose the deed of trust were she living or that her executrix is now estopped. It is possible that the purchase of these notes by Mrs. Gastrell, the aunt of Mrs. Kingsbury, operated to secure these debtors in the use and enjoyment of their home for a number of years.

Affirmed.

CALLAHAN CONST. Co. *et al.* v. RAYBURN.

[69 South. 669.]

1. MASTER AND SERVANT. Independent contractors. Who are. Trial verdict. Sufficiency.

Where a railroad company entered into a contract with a contractor for the execution and removal of dirt from one part of its right of way to another and it was provided in the contract that the railroad company's trains should have preference over those of the contractor, that the contractor's train crew should be such as were satisfactory to the railroad company's superintendent and required to pass such examination as he might prescribe, that any who were unsatisfactory, might be discharged, and that the contract should not be sublet save with the consent of the railroad company's chief engineer, and where the chief engineer consented to the subletting of part of the contract, and plaintiff, an employee of the railroad company, was directed to report to the contractor for service on one of his trains, and while so engaged, was injured through the negligence

of a fireman employed by the subcontractor over whom the principal contractor exercised no control. In such case the contractor was not liable for his injuries, the negligent servant being that of an independent contractor.

2. SAME.

An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished.

3. MASTER AND SERVANT. *Independent contractor. Who are.*

As the railroad company had supervision over the employees of the subcontractor, such contractor was not as to it an independent contractor, and plaintiff could recover from the railroad company.

4. TRIAL. *Verdict. Sufficiency.*

In a suit against two defendants, a verdict that "we the jury, find for the plaintiff and assess his damages at five hundred dollars," was sufficiently definite.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by C. A. Rayburn against the Callahan Construction Company and the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendants appeal.

Appellant the Louisville & Nashville Railroad Company, desiring to have certain dirt excavated and removed from one point upon its right of way to another, entered into a contract with appellant Callahan Construction Company, by which the construction company undertook to do the work in accordance with the terms of the contract entered into. This contract provided how, when, from, and to where this dirt should be excavated and removed, and the compensation the construction company should receive therefor, but reserved to the railroad company no control over the means by which the work was to be accomplished except with reference to the running of trains over its road by the Callahan Company when moving the dirt from the place where it

was excavated to the point on the railroad company's right of way where they desired to use it. That provision of the contract is as follows:

"All the work shall be done in such a manner as not to interfere with or delay the movement of the railroad company's trains, and all movements of the contractors' equipment over the railroad company's main and side tracks shall be under such rules and restrictions as said division superintendent may prescribe. The railroad company shall not be liable to the contractors for any loss or delay on account of contractors' trains being delayed by movements of the railroad company's revenue trains, it being understood and agreed that the contractors' trains shall at all times keep out of the way of the railroad company's trains, and the railroad company's trains shall have preference in movements over the main track."

"The contractors' train crews shall be such as are satisfactory to the railroad company's division superintendent, and shall be required to pass such examinations as to their fitness or efficiency as said division superintendent may prescribe. Any of the contractors' employees engaged in the movement of contractor's trains over the railroad company's main track who are not satisfactory to the railroad company's division superintendent, shall be discharged at his request."

This contract also contains a clause which provides that:

"It is further agreed that the work to be done under this contract shall not be sublet without the consent of the chief engineer of the railroad company, but shall be done by the contractors, parties to this contract, unless he approves of subletting it, in which event the contractors, parties to this agreement, shall be responsible for the proper performance of the contract."

With the consent of the railroad company's chief engineer, according to undisputed evidence introduced on behalf of the Callahan Construction Company, this com-

pany entered into a contract with King & Clark, a partnership, by which King & Clark undertook to do for it the work it had agreed to do for the railroad company in accordance with the terms of its contract with that company; and thereafter the work was proceeded with by King & Clark in accordance with these contracts.

Appellee while in the employ of appellant railroad company was ordered by it to report to Callahan & Company for service on trains used by it in transporting dirt over the company's road. While so engaged he was injured by reason of the negligence of the fireman of the train upon which he was then discharging the duties of flagman. This fireman, together with the engineer—and, so far as the evidence discloses, all the other persons engaged in running the train—was in the employ of King & Clark. The suit was filed against the railroad company and the construction company, King & Clark not being made parties thereto.

Gregory L. Smith and Joel W. Goldsby, for appellants.

As the undisputed evidence showed that the plaintiff was injured by the negligence of the fireman and that the fireman was an employee either of the Callahan Construction Company or of King & Clark, and not an employee of the Louisville & Nashville Railroad Company, the railroad could not be made liable for injuries resulting from his negligence.

It is true that it was the duty of the railroad company to furnish its employees a safe place to work, and to exercise reasonable care not to associate him with incompetent co-workers. *Howd. v. M. C. R. R. Co.*, 50 Miss. 178; *Memphis R. R. Co. v. Thomas*, 51 Miss. 637. But there is no evidence that the place where plaintiff worked was unsafe or that the fireman whose negligence caused the injury, was incompetent.

The charge of the court given at the request of the plaintiff, as applied to the Louisville & Nashville Rail-

road Company is in direct conflict with the law as stated in the foregoing authorities, and declares that the railroad company was liable for the negligence of the servant of the Callahan Construction Company. This was erroneous as a statement of the law, either under the common law or under the statute. Under the common law, the employer is not liable to an employee for the negligence of a co-servant in the same employment, and under the statute the employer is made responsible to one employee only for the negligence of another employee of the same master.

It follows that the charge given for the plaintiff was erroneous in so far as it authorized a verdict against the Louisville & Nashville Company.

If the fireman was employed by the Callahan Construction Company, as hypothesized by the charge, then that company was liable to the plaintiff for the negligence of the fireman, whether plaintiff was in the employment of the construction company or not. If the plaintiff and the fireman were both employed by the Callahan Construction Company, the liability arose out of the statute; while if the plaintiff was not in the employ of the Callahan Construction Company, then that company was liable to him under the common law for the negligence of its servant, but the undisputed evidence was that the fireman was not in the employment of the Louisville & Nashville Railroad Company, and as the railroad company could not be liable for his negligence unless he was in its employ, the court erred in not giving on behalf of the Louisville & Nashville Railroad Company, the affirmative charge.

Rushing & Guice, for appellants.

The inquiry in this case is whether King & Clark were independent contractors or servants of the appellant. We quote the following authorities in support of our contention that King & Clark were independent contractors.

"A railroad company may contract for the construction of its road by another person, without retaining any

control over the manner of doing the work, or may make such contract with regard to repairs on its road; (and, in case of injuries occurring from the negligence or misconduct of a contractor or his employees, or during his control of the road the liability of the railroad company, as in the case of natural persons, depends upon whether the contractor was the agent or employee of the company, or was an independent contractor). 33 Cyc. 698 (and this question is determined primarily by whether the railroad company had the right to control the manner of doing the work. *Rome et al. Ry Co., v. Chasteen*, 88 Ala. —7 So. 99; *Cunningham v. International Ry. Co.*, 51 Texas 503, 32 Am. Rep. 632; *Bibb v. Norfolk Ry. Co.*, 87 Va. 711, 1455 E. 163.); or in possession or control of the road or the operation of the train thereon at the time and place of injury . . . If the contractor for the construction is an independent contractor, the company will not be liable for his negligence or wrongful acts. See 41 Century Digest, title Railroads 793-798'' *City etc. Rys. Co. v. Morres*, 80 Md. 348, 30 Atlantic 645; 45 Am. St. Report 345; *Mayor etc., v. McCary*, 84 Ala. 469, 4 So. 630; *Myer v. Hobbs*, 57 Ala. 75; *Cunningham v. Railroad Co.*, 51 Tex. 503; *Railway Co. v. Fitzsimmons*, 18 Kan. 34; *Hughes v. Railway Co.*, 39 Ohio St. 461; 1 Shear. & R. Neg. pp. 158; *Railroad Co.*, 71 Mo. 303; 2 Amer. Dig., p. 1738; *L. & N. Ry. Co. v. Cheatham*, 100 S. W. 902, 118 Tenn. 160; *Good v. Johnson*, 88 Miss. 439; 7 Amer. Dig. 1907A., p. 3364-65; *Good v. Johnson*, 88 Pac. 439; 8 Amer. Dig. (N. C., 1909), p. 1830; *Smith v. South & W. R. Co.*, 66 S. E. 435, 151 N. C. 479; 4 Amer. Dig. (La. 1908), p. 2015; *Cole v. La. Gas Co.*; 146 So. 801, 121 La. 771; *Ford v. Same, Id.*; 7 Amer. Dig. (N. Y. Sup. 1909), p. 1826; *L. & N. Ry. Co. v. Smith, Adm.*, 119 S. W. 291; 6 Amer. Dig., (W. Va. 1908,) page 1626; *Vickers v. Kanawha & W. V. R. Co.*, 63 S. E. 367, 20 L. R. A. (N. S.) 793; *Hooe v. Boston & N. St. Rys. Co.*, 73 N. E. 341; *Boyd v. Ry. Co.*, 75 N. E. 496.

It is insisted that the case of *Finkbine Lumber Co. v. Cunningham*, 57 So. 916, is authority for the proposition that the subcontractors herein were servants and not independent contractors. The facts in the two cases are radically different. In the case at bar, the appellant had no connection as servants with the railroad company, being contractors engaged in this line of work and executing a contract to cover every detail of the work. The firm of King & Clark were not employees of the appellant, but did their work under contract, setting out in detail what they were to do and renting such equipment as was necessary for them to use in performing their agreement. There is no testimony to show that any employee of the appellant exercised supervision over the work.

In conclusion we quote the opinion of Justice CAMPBELL, in *Buckner v. Ry. Co.* 18 So. 449, 72 Miss. 873.

"The precise question here presented is the right of a servant of the lessee to recover of the lessor for a cause of action he has against the lessor, his employer, for an injury received by the use of defective machinery leased. Pretermittin any expression of opinion not called for by this case, we have no hesitation to say that the servant of the lessee must recover, if at all, from his master and not another. 'To his own master he standeth or falleth. To him is answerable and to him he must look for redress for all injuries sustained in his service.' "

Mize & Mize, for appellee.

It is true that King & Clark were not independent contractors. An independent contractor is one who represents the master's will only as to the work completed while the ordinary servant represents the master's will not only as to the work completed but also as to the means and details he uses in completing the work.

The contract between Callahan Construction Company and King & Clark made the contract between the Louisville & Nashville Railroad Company and Callahan Construction Company. 110 Miss-8.

struction Company part of the contract between Callahan Construction Company and King & Clark; so said contract between the Louisville & Nashville Railroad Company and Callahan Construction Company and King & Clark were bound by its terms, and its terms were such that said railroad company had control of the parties, whoever they might be, who were doing the work, as to the means and manner and practically every detail of the work. Let us see some of the details which bound King & Clark since it was part of the contract between King & Clark and the Callahan Construction Company.

The first paragraph of the contract gives details as to how the labor should be performed; the second paragraph the same way; the third the same way; the fourth, the same way; the fifth the same way; the sixth, the same way; and at pages 68, 59, and 70 of the record we find the following paragraph of said contract:

“The contractors’ train crews shall be such as are satisfactory to the Railroad Company’s Division Superintendent, and shall be required to pass such examinations as to fitness or efficiency as said Division Superintendent shall prescribe; and any of the contractors’ employees engaged in the moving of contractors’ trains over the Railroad Company’s main track who are not satisfactory to the Railroad Company’s Division Superintendent shall be discharged at his request.”

This clearly shows that the Louisville & Nashville Railroad Company had supervision over the exact kind of labor that should be used under its contract with Callahan & Company; and of course it would have the same authority over King & Clark, sub-contractor of Callahan Construction Company. We think this paragraph sufficient to show that King & Clark were not independent contractors.

The contract further provided that the construction company should conform to the laws and regulations of the state of Mississippi as to the condition of its rolling stock.

If there ever was a contract wherein the contractor, to wit, the Louisville & Nashville Railroad Company, had full control of the manner and means of doing the work and supervision over its contractee, this is one.

The contract also provided that the contractee should insure the employees in a responsible insurance company. This was testified to by McCauley, secretary of the Callahan Construction Company, who would send a man down to see if King & Clark were doing the work properly, and that he would stop by to see how the work was getting along; that if King & Clark had not been doing the work properly, Callahan Construction Company would have compelled them to do it properly. Wilkerson testified that Keller, superintendent of Callahan Construction Company, came down about Christmas and took charge of the work and supervised and gave orders concerning the work.

In other words, the acts relied on by Callahan Construction Company to show that King & Clark were independent contractors are not sufficient to show that King & Clark were independent contractors. The trouble with appellant, Callahan Construction Company, in its contention in this respect, is that it fails to draw a distinction between an independent contractor who represents the master's will only as to the work turned out, and a subcontractor who may be, as in this case, under the supervision of the master as to the details and manner of doing and completing the work.

King & Clark were clearly not independent contractors. *Cunningham v. Finkbine Lumber Company*, 101 Miss. 492, and cases there cited.

The Louisville & Nashville Railroad Company is liable in this case on the theory that one who loans or hires his servants to another is liable for its servants getting hurt by the negligence of the one to whom the servants are loaned or hired.

4 Thompson on Negligence, sec. 3725, lays down the following:

"It has been held that the owner of a building in process of construction by an independent contractor, who lends to such contractor a gang of his own employees, is responsible for an injury resulting to one of them through being put into a dangerous place under the orders of his foreman. The contractor also is liable."

So under the above authority, Callahan Construction Company and Louisville & Nashville Railroad Company, if there was negligence, are both liable.

In the case of *Roe v. Winston*, 86 Minn. 77; s. c. 90 N. W. 122, the court lays down the following doctrine:

"The defendant partners were engaged in the work of railroad construction, and had contracted to do certain grading on the line of a railroad. The railroad company furnished defendants with certain work trains with employees to operate them. The servants who took charge of the trains remained in the general employ of the railroad company but were paid by defendants and were under their direct control for the time being. The plaintiff, a brakeman on said train, was injured by the negligence of the engineer. It was held that the servants in control of the train were for the time being the servants of defendant, and defendants were liable."

This case is strikingly like the instant case. in this case appellee was loaned to the Callahan Construction Company under penalty of discharge if he objected to being loaned.

So our contention is that both of appellants, Callahan Construction Company and Louisville & Nashville Railroad Company, are liable, but, as this is a case of joint tortfeasors, the court may reverse as to one and affirm as to the other or affirm as to both, but, in any event, appellee's judgment should be affirmed.

SMITH, C. J., delivered the opinion of the court.

(After stating the facts as above). The principal complaint of appellants is that the court below refused to grant them a peremptory instruction.

The ground upon which this instruction was sought is that appellee was not injured by reason of their or their servants' negligence but by the negligence of a servant of King & Clark, independent contractors, over whose servants appellants had no control.

"An 'independent contractor' is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." 4 Words and Phrases, 3542.

"Where one person is employed to do certain work for another who, under the express or implied terms of the agreement between them, is to have the right of exercising control over the performance of the work, to the extent of prescribing the manner in which it shall be executed, the employer is a master, and the person employed is his servant." 1 Labatt's Master and Servant, 9.

Tested by these definitions, it seems clear that, in so far as the Callahan Construction Company is concerned, King & Clark were independent contractors, and that no verdict should have been rendered against it.

The servant of a contractor may be, under some circumstances, the servant also of the principal employer, and such is the case (1 Labatt's Master and Servant, 123) when, "That by virtue of the original agreement between the principal employer and the contractor the former acquired the right of giving directions to the servants of the latter with regard to the manner in which the work was to be done. Manifestly, under such circumstances, the contractor is not, in the proper sense of the term, an 'independent contractor,' and, according to the decided preponderance of authority, both he and such

persons as he may engage for the work in hand are in law the servants of the principal employer for all purposes." When, in addition to the right to direct the manner in which work is to be done by the servants of a contractor, the principal employer reserves the right to require the contractor to discharge such of his (the contractor's) servants as are not satisfactory to him (the principal employer), then there can be no doubt that the servants of the contractor are servants of the principal employer. This is the exact situation here in so far as the running of trains by the servants of Callahan & Company and of their contractors, King & Clark, over the road of appellant Louisville & Nashville Railroad Company is concerned. It is true that the contract between this company and Callahan & Company, the obligation of which in this respect was assumed by King & Clark, does not in express terms confer upon it the right to control the servants of Callahan & Company while engaged in the running of trains upon its road, but "a provision in an agreement which confers upon the superior employer the right of controlling the contractor himself in respect to the details of the work must necessarily imply that he is to retain the right of controlling, to the same extent, the servants who are the instruments through whom the contractor performs the work. Otherwise such a provision would be meaningless and ineffectual." 1 Labatt's Master & Servant, 126.

It follows from the foregoing views that the court below erred in permitting a verdict to be rendered against Callahan & Company, but committed no error in that regard in so far as appellant Louisville & Nashville Railroad Company is concerned.

The verdict rendered was in the following language: "We, the jury, find for the plaintiff and assess his damages at five hundred dollars." One of the contentions of appellants is that this verdict should be set aside for the reason that it is "too indefinite. It was for the plaintiff,

but did not specify whether it was against one or both of the defendants." There is no merit in this contention.

The judgment of the court below, in so far as it affects the Callahan Construction Company, will be reversed, and the cause to that extent dismissed; but, in so far as it affects the Louisville & Nashville Railroad Company, the judgment of the court below is affirmed.

Reversed.

Affirmed.

CENTRAL TRUST CO. OF ILLINOIS ET AL. v. HAYNES.

[69 South. 663.]

TAXATION. *Action to confirm tax title. Pleading. Cure. Statutes.*

Where a bill to confirm a title purchased at a tax sale, alleged that one of the defendants was claiming title and had executed a deed of trust to the other defendant, that the property had been legally assessed to an unknown owner for taxes due the county, that after the collector's failure to sell for delinquent taxes the county board of supervisors by order entered on its minutes directed the sheriff to sell it on a certain date, that after due advertisement the collector made the sale on such date and executed a deed to the purchaser at the expiration of two years and complainant had title from such purchaser. The defects if any there were in the allegations of the bill of complaint were cured by sections 4332 and 4367, Code 1906, and a demurrer to the bill was properly overruled.

APPEAL from the chancery court of Lamar county.

HON. R. E. SHEEBY, Chancellor.

Bill by Mrs. W. P. Haynes against the Central Trust Company of Illinois and others. Demurrer to bill overruled and defendants appeal.

Appellee filed her bill in the chancery court of Lamar county against Camp & Hinton Company, the Central Trust Company of Illinois, and A. Uhrlaub as defend-

ants, alleging that she was the legal owner of the land in controversy, having purchased same from one Whitsett, who had purchased it at a tax sale. The bill is for the purpose of quieting her title and cancelling the claim of the defendants herein to the property; it being alleged that the Camp & Hinton Company was claiming title to the land, and that it had executed a deed of trust to the Central Trust Company, Uhrlaub being named as trustee. The bill alleges, after deraigning the title, that said property was duly and legally assessed on the assessment roll of said county for taxes due the county and state for the fiscal year of 1906 to an unknown owner, and that, the taxes thereon having become delinquent, and the tax collector of said county having failed to sell said lands for said delinquent taxes for said year on the date designated by the statute, and having reported said failure to the board of supervisors, said board, by order entered on the minutes, directed the sheriff to make said sale on the 6th day of May, 1907, and that, after due advertisement according to the law, the tax collector proceeded to make the sale on the date mentioned, when Whitsett became the highest and best bidder, and the lands were struck off to him, and that the tax collector executed a deed conveying said land to said Whitsett, which deed remained on file for more than two years with the chancery clerk of said county, and that after the expiration of two years, to wit, on the 7th day of May, 1909, the chancery clerk delivered sale deed to said Whitsett upon payment of all charges, and that the title to said land thereby became vested in said Whitsett, from whom appellee acquired title.

The appellants demurred to the bill upon the following grounds:

First. That there was no equity in the bill.

Second. That the bill showed on its face that the sale was void and did not convey title. Upon this ground it is contended that appellee does not show that there was a valid assessment, or a lawful levy of taxes, or a

legal sale, but that the allegation in the bill is a mere conclusion of the pleader. In reply to which contention appellee cites section 1983 of the Code of 1906, which provides that:

“A conveyance made by a tax collector to an individual purchaser of land at a sale for taxes, and the list of lands sold to the state at such sale, shall be *prima facie* evidence that the assessment and sale of the land were legal and valid.”

Third. That the sale was made upon a day other than that fixed by the statute. In response to this contention appellee cites section 4367 of the Code of 1906 which provides that:

“If from any cause a sale of . . . land for taxes which is liable to such sale shall not be made at the time appointed by law for such sale, it may be sold thereafter, in the same or a subsequent year, at any time designated therefor by order of the board of supervisors.”

Appellee also cites section 4332 of the Code of 1906; which provides that:

“Which conveyance shall vest in the purchaser a perfect title to the land sold for taxes, subject to the right of redemption; and no such conveyance shall be invalidated in any court except by proof that the land was not liable to sale for the taxes, or that the taxes for which the land was sold had been paid before sale, or that the sale had been made at the wrong time or place. . . .”

W. A. Shipman, for appellants.

In the matter of a sale for taxes, three things are necessary to be alleged and proven: First, a valid assessment; second, a lawful levy, and third, a legal sale.

“A levy of a tax is absolutely indispensable to create a legal obligation to pay it. A tax must be due and unpaid; and this case of taxation of property can only be shown by proof that the property was assessed, listed

and valued, and that the tax was in fact, levied by competent authority." See *Adams Rev. Agt. v. Bank*, 74 Miss. 316. See, also, *Virden v. Bowers*, 55 Miss.—.

Complainant's allegation "that the taxes both for state and county for the fiscal year of 1906 was due, owing and unpaid by defendants or any other person on or before the sixth day of May, 1907, and that said taxes became delinquent and were a charge and a lien against said land according to the laws of the state of Mississippi" is another conclusion of law on the part of the pleader. Having failed to set out any levy of taxes, legal or illegal for the year of 1906, the complainant cannot by mere allegation or conclusion of law, avail himself thereof, without a statement of facts going to establish the conclusion that the taxes were due and unpaid, and that such were a charge and a lien against the land by setting out that all necessary conditions precedent thereto, had in fact been complied with in the manner required by law. The cases of *Grayson v. Richardson*, 65 Miss. 222 and *Morgan v. Blewitt*, 72 Miss. 903, are not in point; for what was held by the court in each of these two cases was that "where there is no evidence as to when an assessment roll was presented to the clerk, the presumption will be indulged that it was delivered at the proper time." In the instant case that presumption cannot be indulged, for the simple reason that there is no showing on the face of the bill of complaint that any assessment roll was ever, at any time, either presented by the assessor or approved by the board of supervisors, and further there is not the slightest intimation that a levy was ever made.

The complainant in the fourth paragraph of her complaint alleges that the tax collector having failed to sell lands for which taxes were delinquent for said fiscal year on the date designated by statute and having reported said failure to the board of supervisors, the board, by an order "duly" entered on the minutes ordered that the sale take place on the first Monday in May, 1907, being the sixth day thereof.

This allegation is but another conclusion of the pleader. Neither the minute book, nor page, nor date of the order is given; no reference thereto, or leave to refer to such records for the purpose of the suit is prayed. No facts are stated upon which the pleader predicates the allegation, that an order was "duly" entered on the minutes.

"In a proceeding by mandamus to compel a court to decree the result of an election, an averment that the election was "duly" held, is a conclusion of law. See *State v. Malheur County Court*, 46 Ore. 519, 81 Pac. 368.

This allegation, therefore, raises no issue, need not be denied, and the truth of it is not admitted by the demurrer to the bill of complaint containing it. See *Kittenger v. Traction Co. supra* and other authorities cited.

In like manner the allegation contained in the fifth paragraph of the bill, that the lands were "duly and legally" advertised in a newspaper published in the county and that the tax collector, did at the time advertise and as provided by law and the order of said board of supervisors offer for sale and did sell the said lands, etc., is tainted with the same fault. There is no reference to any records but the mere statement of the pleader that such things were done. The name of the newspaper is not given. No copy of such advertisement is exhibited to the bill, and no reference to the amount paid by the complainant at such sale for the land. Nothing to show or indicate that the tax collector offered the land in forty-acre tracts, or that the sale was "duly and legally" conducted, save the mere conclusion of the pleader.

"A tax sale made on a day other than that provided by the statute confers no title." *McGehee v. Martin*, 53 Miss. 519; *Harkreader v. Clayton*, 56 Miss. 394.

It was, however, insisted by counsel for complainant in the lower court, that under the provisions of sections 2935 and 4367, Code of 1906, which provides the mode for selling lands not sold at the regular time, the rule stated in the two cases last cited was inapplicable to the present

case, and that it falls within the provisions of those two sections of the Code. In *Brougher v. Conley*, 62 Miss. 358, the court by Chief Justice CAMPBELL said: If after the time fixed by law for the sale of land for taxes it appears that any land liable to such sale was not sold, as it should have been, it may be sold by order of the board." And further construing the statute, the learned Chief Justice said: "This section sprang from the apprehension, that by inadvertence or oversight, some land might escape sale at the regular time, and was intended especially for such cases. Its language is broad enough to embrace a failure as to the entire list of delinquent lands, and when it appeared at a time subsequent to the time fixed by law for the sale of land for taxes that no sale had been made, from any cause, it would be competent and proper for the board of supervisors, under this section, to order the sale to be made at a future date; but this is very different from granting an indulgence beforehand.

"A tax collector who fails to advertise and sell lands delinquent for taxes at the time prescribed by law can obtain no relief from responsibility by an order of a board of supervisors, which cannot thus thwart the law."

In the *Brougher* case it appears affirmatively that the order of the board was made on the first Monday in March, which was the day designated by law for the sales; therefore, the order made on that day was not made at a time subsequent to the time fixed by law. In that case the order of the board was that the tax collector "have until the fourth Monday of April, A. D. 1881, to make the sale for taxes." And therefore, the board, while attempting to fix the time, did not in fact do so, but left it to the tax collector. In the instant case we know absolutely nothing, as to what the order of the board, assuming there was in fact, an order, contained, except the general averment of the pleader; nor can we possibly ascertain from the pleadings whether this order, assuming there was one, was made before or subsequent to

the time designated by law for the sale of land delinquent for taxes.

In the case of *Clark v. Frank*, 3 So. 531, the same kind of an order was made by the board of supervisors, as that in the *Brougher case*, *supra*, except that here the time for the sale was fixed definitely by the order as on the first Monday in April; the order being made the first Monday in March, the day fixed by law as the time when the sale should have been made. The owner filed a bill to set aside and declare the sale void, to which bill a demurrer was filed, on the ground that the bill did not negative the idea that the order of the board may have been after four o'clock of the day of its date, and after the time appointed by law for such sales, etc.

Without argument or discussion the supreme court, through Chief Justice COOPER, held the sale under the order of the board to be void, merely citing the case of *Brougher v. Conley*, *supra*.

Inasmuch as a failure to advertise the sale of land delinquent for taxes, if sold at the proper time and place, will not render such a sale invalid, and assuming as we must, by reason of complainant's failure to set out the date, that the order of the board was made on the day fixed by law as the time for such sales, we see that the tax collector could have proceeded on that day to make the sale without advertising and such sale would have been valid. Section 4328, Code 1906. The sale under the void order of the board was itself absolutely null and of no effect, and the rule laid down by the court in *Howie v. Alford*, 100 Miss. 485 and *Simpson v. Cooperage Co.*, 58 So. 4, as to the time for filing the tax deed applies.

That a deed for land sold May sixth could not have been filed in the clerk's office on the first Monday of April, in the same year is perfectly manifest, yet it might have been, had the tax collector performed his duty and made the sale on the day "designated by law as the time for making sale of land delinquent," etc.

It is therefore earnestly urged by counsel for appellants that in the light of the authorities herein cited, and the manifest error of the lower court, in overruling defendant's demurrer to the bill of complaint, this honorable court will reverse the decree entered in the lower court, with such direction as justice and the law may require.

T. W. Davis, for appellee.

Appellant earnestly contends in his brief that in the matter of tax sales three things are necessary to be alleged and proven: (1) A valid assessment; (2) A lawful levy; and (3) A legal sale.

In answer to this contention of appellant, appellee maintains that it is not necessary to allege, either or any of the three propositions, nor to prove them, where the tax collector's deed is made an exhibit to the bill of complaint. Section 1983 of the Code of 1906, is in the following language: "A conveyance made by a tax collector to an individual purchaser of land at a sale for taxes, and the list of lands sold to the state at such sale, shall be *prima facie* evidence that the assessment and sale of the land were legal and valid. "Complainant made the record of her tax deed an exhibit to her bill of complaint (see bill of complaint in the record), and, is entitled to the benefit of this statute.

It is not necessary to allege in the bill of complaint a detailed statement of facts showing each and every fact necessary to make a legal and valid assessment and sale of land, where the tax collector's deed to an individual purchaser at a tax sale is made an exhibit to the bill of complaint, but the law presumes that all the officers performed their duties as required by law, and it is incumbent upon the party attacking the validity of a tax sale to allege and prove facts sufficient to show an illegal sale. Section 1983, Code of 1906; *Belcher v. Moon*, 47 Miss. 613; *Meeks v. Whatlet*, 48 Miss. 337.

The allegation in the bill of complaint (see paragraph five), of purchase and acceptance of a deed, under section 1983, Code 1906, does *prima facie* in substance aver a vestiture of the title of the owner, and all others interested in purchaser, and dispenses with the averment that the several prerequisites, to authorize a sale, have been conformed to. The statute says that the tax collector's deed to an individual purchaser at a tax sale shall have that effect. The plaintiff, then, when he alleged a sale and the execution of a deed to him, made the averment equivalent to a detailed narrative of a compliance with each special prerequisite. Section 1983, *supra*; *Belcher v. Mhoon*, *supra*; *Meeks v. Whatlet*, *supra*.

This presumption in favor of the validity of a tax sale extends to and includes, in the absence of proof to the contrary, the filing of the tax deed by the tax collector as required by law. *Wheeler v. Ligon*, 62 Miss. 500.

This presumption also applies to the approval and filing of the assessment roll as required by law. *Henderson v. Mayfield*, 79 Miss. 533, 31 So. 103.

The same presumption applies to the sale of the land in forty acre tracts by the tax collector as required by law. *Mixon v. Clevinger*, 74 Miss. 67, 20 So. 148.

The same law and procedure applies to tax sales made by order of the board of supervisors, where the tax collector has for any reason, failed to sell the land to sell the land delinquent for taxes on the date designated by statute, as applies to sales made at the regular time designated by the statute, sections 2935 and 4367, Code of 1906. The bill charges that G. W. Holleman, tax collector of Lamar county failed to sell the lands in said county for taxes for the year 1906 on the date designated by statute, and that he reported his failure to sell said land to the board of supervisors of said county, and that the board of supervisors, on receiving the report of the tax collector, stating that he had failed to sell said land on the date designated by law, entered an order on its minutes, directing that said land be sold on the

first Monday, the sixth day of May, 1907. See paragraph four of the bill, pages 3 and 4 of the record.

It is true that this order of the board of supervisors fixing the date for the sale of the land is not made an exhibit to the bill, but the bill, as just stated, charges that the tax collector failed to sell the land on the date designated by statute, and charges that he reported his failure to the board of supervisors, and charges that the board of supervisors entered an order on its minutes fixing the first Monday of May, the sixth day of said month, as the date for said sale and for the purposes of this demurrer, must all be taken as true. If all the jurisdictional facts charged in the bill appear in the minutes of the board as charged, would not the minutes of the board be simply proof of the allegations of the bill? Certainly the failure to make the minutes of the board of supervisors an exhibit to the bill cannot be taken advantage of by a demurrer, where the facts are charged in the bill.

If the tax collector, from any cause, fails to sell the land in his county delinquent for taxes on the date designated by law, the board of supervisors are authorized and empowered to fix some future date for the sale of the land so delinquent. Sections 2935 and 4367, Code 1906; *Brougher v. Conley*, 62 Miss. 358.

It is true that the board of supervisors cannot exceed their authority granted in section 2935 and 4367, Code 1906. It is also true that the board of supervisors have no power to act until the time designated by statute for the sale of land delinquent for taxes has passed, and the tax collector has failed to sell the land so delinquent. This is a condition precedent to the power of the board of supervisors, but it certainly seems to us that a failure on the part of the tax collector to sell on the date designated by statute is sufficiently, and affirmatively charged, and that the board acted after the tax collector had reported his failure to sell on the date designated to the board, and if these allegations be true, and they must be taken as true for the purposes of this demurrer, then

the board of supervisors had jurisdiction of the matter, and if these jurisdictional facts appear in the minutes of the board as charged, the sale made pursuant to the order of the board is as legal and valid, as if the sale had been made on regular date designated by law. Sections 2935 and 4367, Code 1906; *Brougher v. Conley*, *supra*.

We submit that the bill of complaint, together with the exhibits thereto, states a good cause of action, and the court below properly overruled the demurrer, and the action of the lower court should be affirmed by this honorable court.

F. M. Hunt, for appellee.

The demurrer was properly overruled. The bill stated a good cause of action. The bill did not, as appellants contend, show that the sale was on a day not authorized by statute, under the conditions existing for the sale of lands for taxes. The bill gives a good and legal reason why the land was sold on the day it was sold, instead of on the day designated by statute. We wish merely to call attention to section 754 of the Code, which says:

“When a demurrer shall be interposed, the court shall not regard any defect or imperfection in the pleadings, except such as shall be assigned for causes of demurrer, unless something so essential to the action or defense is omitted that judgment, according to law and the rights of the cause, cannot be given.”

This section is made applicable to chancery courts by section 687 of the Code, and in the light of this section the demurrer should certainly have been overruled. But we expect to show that without this provision of law, the demurrer should have been overruled.

It cannot be said that sections 4367 and 2935 of the Code are a nullity. The Code has two sections on the same subject, each authorizing the board of supervisors to fix a day for the sale of any lands for taxes that, for 110 Miss.—9.

any cause, were not sold on the date designated by statute. Certainly the authority of the Board of Supervisors given twice in the same Code must be valid. However, the power must be strictly construed. The board of Supervisors can do what the legislature expressly authorizes them to do, but cannot exceed the authority given. The board of supervisors have no power to act until the time designated by statute for the sale of lands for taxes has passed, and the tax collector has failed to sell the land at the time designated by statute. The statutes just referred to do not give the board any authority to act until the tax collector has already failed to sell on the date designated by statute. So they cannot make a valid order fixing another date for the sale until the date designated by statute has passed, and the tax-collector has failed to sell the land. This is a condition precedent to their power to act. This is all the case of *Brougher v. Conley* holds, and is the necessary result of placing a strict construction on the powers granted to the board of supervisors. The statutes authorize the board of supervisors to fix a time for the sale, "if from any cause" a sale of the land for taxes shall not be made at the time appointed by law. This is broad enough to cover a sale of all lands, as well as a failure for any cause. The case of *Brougher v. Conley*, 62 Miss. 358, cited by counsel for appellant, contains the following language:

"If after the time fixed by law for the sale of lands for taxes, it appears that any land liable to such sale was not sold, as it should have been, it may be sold by order of the board of supervisors. The section sprang from the apprehension that by inadvertence or oversight some land might escape sale at the regular time, and was intended especially for such cases. The section is broad enough to embrace a failure as to the entire list of delinquent lands, and where it appeared at a time subsequent to the time fixed by statute for the sale of land for taxes that no sale had been made, from any cause, it

would be competent and proper for the board of supervisors under this section to order that the sale be made at a future date; but this is very different from granting an indulgence beforehand. A tax collector who fails to advertise and sell lands delinquent for taxes at the time prescribed by law can obtain no relief from responsibility by any order of a board of supervisors. If the board of supervisors pass an order before the things that are necessary to give them authority have occurred, their order is nullity. In the case of *Brougher v. Conley*, *supra*, the board of supervisors undertook to fix a date before the conditions under which they were authorized to act arose, and the court held that, for that reason, their action was void. If the board of supervisors were permitted before the date for selling lands for taxes had passed, to pass an order fixing a different date, the tax collector would have a statute directing him to sell on a different date from the date fixed by the board of supervisors. He could not then obey both the statute and the order of the board of supervisors, and he would have to decide which he should obey. He is bound to sell on the date designated by the legislature, unless the legislature has expressly given the board of supervisors the power to change the requirement of the statute, and thereby to nullify it. If he will read sections 4367 and 2935 of the Code, he will see that the board of supervisors had no power to pass the order until the time designated by statute for the sale of lands for taxes had passed, and the tax collector had failed to make the sale. So the order of the board of supervisors is void, and he must follow the directions of the statutes. To allow the board of supervisors to fix a day different from that named in the statute for the sale before the time fixed by the statute has passed, would be authorizing them to nullify the statute fixing the date. To authorize them to fix another date after the time designated by statute has passed would not have that effect. It would not relieve the tax collector from any liability for not making

the sale at the time designated by statute. *Clark v. Frank*, 3 So. 531, 11 Cyc. 298; 2 Ohio Decision (Reprint 553; 3 West. L. Month. 632; *Bolivar County v. Coleman*, 71 Miss. 832, 15 So. 104.

In the case of *Hinton v. Perry County*, 84 Miss. 534, 36 So. 565, this court, in discussing an order of the board of supervisors of Perry county, says: "It being in this matter, of limited jurisdiction, the minutes must show the jurisdictional facts were found to exist." *Craft v. DeSoto County*, 79 Miss. 618, 31 So. 204; 7 Ency. Pl. & Pr. 467, *et seq*; 12 Am. & Eng. Ency. Law., 271; *White v. Railroad Co.*, 54 Miss. 566, 1 So. 730; *Board v. Allen*, 60 Miss. 93; *Ladden v. Railway Co.*, 66 Miss. 258, 6 So. 181; *Morgan v. State*, 79 Miss. 659, 31 So. 338; 74 Miss. 435, 21 So. 247; 4 Am. & Eng. Ency. Law., p. 375.

Sections 4328 and 4332 of the Code make the tax collector's deed *prima facie* evidence that the title of the purchaser is good. In this case appellants raise in their brief on appeal for the first time, the point that the bill is insufficient for not showing a detailed statement of facts that each and every step necessary to make a valid assessment and sale, regular in every respect. Similar questions to those raised by appellants here in their brief for the first time, and never mentioned in his demurrer in the court below, were especially raised by demurred in the following cases: *Smith v. Denny*, 62 Miss. 358; *Coffee v. Coleman*, 85 Miss. 14, 67 So. 499; *Griffin v. Dogan*, 48 Miss. 11; *Blecher v. Moon*, 47 Miss. 613; and *Meeks v. Whatlet*, 48 Miss. 337. But this court held that the demurrers should be overruled.

Cook, J., delivered the opinion of the court.

The defects, if any there be, in the allegations of the bill of complaint, are cured by sections 4332 and 4367, Code of 1906, and it therefore follows that the decree of the chancery court overruling appellant's demurrer was correct. *Smith v. Denny*, 90 Miss. 434, 43 So. 479.

Affirmed.

MOUNGER ET AL. v. GANDY ET AL.

[69 South. 817.]

1. **HOMESTEAD.** *Claims of exemption. Residence. Laws. Construction. Mortgages. Capacity of mortgagor parties. Insanity. Paranoia.*

Where a wife under a decree of divorce and alimony acquired a tract of land belonging to her husband, which land was never under cultivation and on which there was never a house of any sort, except a cotton' house which had not been occupied as a residence, she could not assert her claim as for a homestead in such land against the purchaser under a foreclosure of a prior trust deed, made by her husband to secure the payment of attorney fees.

2. **HOMESTEAD.** *Laws. Construction.*

Homestead laws are liberally construed in favor of the exemptionist, but never as a pretext to claim that which does not really and substantially exist.

3. **MORTGAGES.** *Capacity of mortgagor. Insanity.*

The fact that one executing a deed of trust is afflicted with paranoia, which manifests itself in delusions that do not affect his ability to carry on his business, does not invalidate such deed of trust given by him, and the fact that he has been acquitted of crime on such ground in nowise estops or concludes a party claiming title through him.

4. **WORDS AND PHRASES.** *Capacity of parties. "Paranoia."*

"Paranoia" is a form of mental distress known as delusionary insanity, and a person affected with it has delusions which dominate, but do not destroy, the mental capacity, and though sane as to other subjects, as to the delusion and its direct consequences the person is insane.

APPEAL from the chancery court of Covington county.
HON. R. E. SHEEBY, Chancellor.

Suit by M. U. Mounger and John A. Yeager against W. W. Gandy and others. From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

M. U. Mounger and R. H. & J. H. Thompson, for appellants.

McIntosh Bros., for appellees.

STEVENS, J., delivered the opinion of the court.

Appellants, as complainants in the court below, instituted this suit in the chancery court of Covington county to quiet their title to the lands described as the north-east quarter of the north-east quarter of section thirteen, township seven north, range fifteen west, and the south-west quarter of the north-west quarter of section eighteen, township seven north, range fourteen west, in said Covington county, and to cancel as a cloud the claim of the defendants. Complainants deraigned title through foreclosure by the trustee of a deed of trust given by the defendant W. W. Gandy to secure an attorney's fee of seven hundred and fifty dollars contracted with and owing complainants as the attorneys for the defense of W. W. Gandy, at that time charged with the murder of one Rutland. After W. W. Gandy was arrested, and while incarcerated, he employed the complainants to defend him, and in order to secure the fee he executed a deed of trust on the eighty acres of land involved in this suit to one Lott, as trustee. This deed of trust was foreclosed, and the land purchased by complainants, who deraigned title from the United States government by mesne conveyances to W. W. Gandy and from Gandy to themselves through said foreclosure. It appears that on the trial of the murder case appellants, as attorneys for W. W. Gandy, interposed the defense that at the time of the homicide the defendant was partially insane, being afflicted with what is known as "paranoia." The jury, on the trial of the criminal charge, found that the defendant was insane at the time of the homicide, and so certified by their verdict, and upon this verdict or finding of the jury W. W. Gandy was committed to the insane hospital

for treatment, and was so confined at the time of the institution of this chancery suit. A guardian was appointed for his estate, and, in response to the bill in this case, filed waiver of service, joined issue in short with all the allegations of the bill, and adopted the allegations contained in the separate answer of his codefendant, Carrie Lee Gandy. It further appears that Carrie Lee Gandy was a minor, and defended by W. C. Davis, her guardian *ad litem*. She admits the execution of the deed of trust, but denies that complainants are the owners of the land in question and that her claim thereto is a cloud upon any title of complainants. It is further claimed in her answer that W. W. Gandy was insane at the time of the execution of the trust deed, and thereby incapable of making said conveyance, and, furthermore, this defendant claimed the lands in question as the exempt homestead. The answer further charges that this defendant filed a bill for divorce against her husband, W. W. Gandy, and secured a decree of divorce, and also awarding her alimony in the sum of three hundred and ten dollars, and a lien upon the lands in question to pay and satisfy her claim for alimony; that in pursuance of this decree R. Norwood, commissioner, duly advertised and sold the lands in question, and at the commissioner's sale the defendant Carrie Lee Gandy purchased the lands and received therefor a commissioner's deed, and by virtue of said deed she claims a title thereto. Considerable testimony was taken for both parties, and the cause thereafter heard by the chancellor on bill, answer, and depositions. The chancellor dismissed the bill, and from his decree appellants appeal.

The testimony shows that one Augustus Gandy, father of the defendant W. W. Gandy, owned lands adjoining the lands in controversy, lying to the east of the forty acre tract in section eighteen and to the north and east of that portion of the land in controversy lying in section thirteen. In 1909 W. W. Gandy, then a member of his father's household, married a girl of tender years,

his codefendant herein, and thereafter he and his child wife lived as a member of Augustus Gandy's household, and in the same house and on the lands owned and occupied by the father as a homestead. They were living as members of this household at the time W. W. Gandy committed the homicide, and at the time of the execution by W. W. Gandy of the deed of trust in question. Carrie Gandy did not join in the execution and delivery of this trust deed. It seems that the lands involved in this suit were acquired by W. W. Gandy before his marriage, and that these lands were wild and uncultivated, and not inclosed, when the trust deed was given, with the possible exception of two or three acres on the northern line of the south-west quarter of the north-west quarter of section eighteen where it is contended by attorneys for the defense, supported by the evidence of the defendants, that the fence inclosing the farm of Augustus Gandy came down across the line from the north and took in several acres of this particular forty title to which was in W. W. Gandy. It was contended by witnesses for the complainants that the fence did not cross the line at that point, and that there was no land belonging to W. W. Gandy under fence or in cultivation in the year 1910 when the trust deed was executed. All the land under fence was claimed by Augustus Gandy, and controlled and cultivated by him or his tenants. There were no improvements on the eighty acres of land covered by the trust deed with this exception: At a time long prior to the execution of the trust deed, W. W. Gandy was cultivating, in connection with others, a field owned by his father along the northern border of the south-west quarter of the north-west quarter of section eighteen and in the farming operations on his father's land he built a cotton house on the northern border of his own land, and it seems that he intended to place this house upon his own land. This cotton house was used all the while in connection with the farm of Augustus Gandy. It further appears that a line drawn one hundred feet south of the

northern line of the forty acre tract in question would fall south of this cotton house, and south of the entire field connected with the elder Gandy's farm, and that the whole of W. W. Gandy's forty acre tract south of that line was wild, uncultivated, and unoccupied. There is some evidence to the effect that, several years before, several acres had been cleared on the upper forty in section thirteen and planted in a few melons and peas, but that this little patch had been abandoned several years before the trust deed was given, and the fence burned down.

A careful examination of the entire record convinces us that the decree of the chancellor is manifestly wrong. Upon the claim of exemption the proof shows conclusively that W. W. Gandy and his wife resided with the husband's parents and as members of the elder Gandy's family. W. W. Gandy never owned any dwelling house of any kind. He had no farm of his own upon the lands in controversy. There were no out houses incident to the usual homestead situated on the lands. The little cotton house, it is true, may be upon the south forty; but this cotton house, though purposely located on W. W. Gandy's land, would not characterize the lands as a homestead. There is no pretense that appellees ever lived in the cotton house, or pretended to do so. Even though the father's field extended one hundred feet across the line and onto the south forty claimed by the son, yet this was the occupancy of the father and a part of his field. The testimony of W. W. Gandy himself is clear, forceful, and convincing. He testifies that the lands in question never constituted his homestead, and that when he executed the trust deed he so represented to appellants. The testimony of the young wife shows that she never claimed the land as a homestead before the trust deed was executed. Pressed on this point, she says:

"I just claimed it as Widney's land; that is all I know about it."

The year the trust deed was given W. W. Gandy was cropping on the lands of his father. His own language is:

“My crop was right around the house mostly; around the house forty.”

He states further:

“As one of the children I lived there in the house with him (the father). I never had left the house.”

The proof fails to show that W. W. Gandy ever established a homestead on either of the forty acre tracts. His residence during his entire married life was upon the father's lands, and at the date of the trust deed he and his wife were residing under the parental roof.

Homestead laws are liberally construed in favor of the exemptionist, but never as a pretext to claim that which does not really and substantially exist. All the many liberal opinions of the court on this subject are vitalized by the principle, well expressed by *TARBELL, J.*, in *Campbell v. Adair*, 45 Miss. 170, in the following language:

“One of the leading objects of these statutes is to create, preserve, and protect a home for the family, for the wife, mother, and children, as well as for the husband and father. A characteristic feature of home is a place of residence, of which occupancy is an essential element. As a general rule, to constitute a homestead there must be actual occupation and use of the premises as a home for the family. The premises must be appropriated, dedicated, or used for the purpose designated by the law, to wit, as a home, a place to abide and reside on, ‘a home for the family.’ ”

The alleged incapacity of W. W. Gandy to execute a valid deed of trust has not been shown or established by the proof. The verdict of the jury in the criminal case in no wise estops or concludes appellants. The issue and parties in that case were entirely different. It appears that Mr. Gandy suffered from what is commonly known as “paranoia,” which is “a form of mental distress

known as 'delusional insanity,' and a person afflicted with such mental disease has a delusion or delusions which dominate, but do not destroy, the mental capacity, and, though sane as to other subjects, on that of the delusion and its direct consequences the person is insane." Words and Phrases, vol. 6, p. 5166, and authorities cited. Whatever the particular form of insanity or delusions under which Mr. Gandy labored, the undisputed proof shows that he at all times attended to his own business, that he freely contracted, traded, and executed for himself deeds of conveyance whenever necessary or proper. His deposition was taken on behalf of complainants in this case, and his utterances therein are well expressed, clear, and forceful. However much appellants might be subjected to ancient joking about pleading the insanity of their client in the murder charge, their rights as litigants in this case should not and cannot thereby be affected.

If the trust deed executed by Mr. Gandy was valid without the joiner of his wife, it follows that the title acquired by appellants through the foreclosure thereof is also valid, and that they are entitled to the relief prayed for in their original bill. We are of the opinion that the decree of the court below should be set aside, and decree entered here cancelling the claim of appellees, and confirming appellants' title.

Reversed and decree here for appellants.

Reversed.

BANK OF EUPORA v. STATE EX REL. WEBSTER COUNTY.

[69 South. 998.]

DEPOSITORIES. *County depositories. Statutes.*

Laws of 1914, chapter 257, amending section 2 of the Act of 1912, chapter 194, which requires the board of supervisors at the regular December meeting to give notice to all banks in the county, and to mail notices to each and every bank in adjoining counties, for proposals to keep county moneys and at the January term to receive proposals, does not empower the board of supervisors to deposit county funds with a bank in an adjoining county, when a bank in the county qualified as a depository, although the bank in the adjoining county offered a greater rate of interest.

APPEAL from the circuit court of Webster county.

HON. H. H. HODGES, Judge.

Mandamus by the state, on the relation of Webster county, against the Bank of Eupora. From a judgment issuing the writ, respondent appeals.

Appellant was county depository for the county of Webster for the year 1914. At the meeting of the board of supervisors of Webster county in January, 1915, the Maben Home Bank was appointed county depository for the current year and qualified as such by giving bond in the sum of fifty thousand dollars. The Bank of Eupora declined to recognize the Maben Home Bank as county depository and declined to surrender to it the money—alleged in the petition to be about forty-five thousand dollars—on deposit with it belonging to the county; whereupon a petition was filed in the court below, praying that a writ of mandamus issue directing the Bank of Eupora to—“make settlement with and payment to the Maben Home Bank as the depository of said county for the year 1915, of all funds and accounts, moneys, and other assets which have been heretofore in the custody and in the possession and control of the said Bank of Eupora.”

A demurrer, setting forth quite a number of objections to the petition, was interposed by appellant, but was overruled by the court. Among the grounds of this demurrer are the following:

“Mandamus not the proper remedy.”

“No averment of the issuance of any county warrant in favor of the relator or any act in that behalf done.”

“No power in respondent to pay over any money except upon a warrant duly and lawfully issued in favor of the proper depository by the proper county officials.”

“No duty to settle with any successor but only to pay over the funds as lawfully drawn by the court.”

A jury was waived and the cause submitted to the trial judge on its merits on an agreed statement of facts, which is as follows:

“It is agreed that there is only one question of law to be decided in this case; that is to say whether or not the board of supervisors can create a county depository out of the county when a bank located in the county is ready, willing, and able to become county depository for the sole reason that the bank out of the county, in an adjoining county agrees to pay more interest than any bank in the county.

It is admitted in this case that the Maben Home Bank is located outside of Webster county; that it made a bid complying in all respects with the law to become county depository of Webster county offering to pay four per cent interest; that the Bank of Eupora being a bank located within Webster county made a bid complying with the law in all respects to become county depository, offering to pay only two per cent interest; and that thereupon both bids being in regular form the board of supervisors of Webster county, accepted the bid of the Maben Home Bank and rejected the bid of the Bank of Eupora, solely because of the difference in the interest rate offered.

“Both banks complied in every respect with the law, but one is located in the county and the other is located

out of the county, and the board of supervisors passed an order and issued a commission to the bank out of the county solely because it offered to pay four per cent. interest when the bank in the county offered to pay only two per cent. interest. The validity of this order, so creating a county depository out of the county upon the ground that said out of the county bank paid more interest than the bank located in the county, is the question for decision."

A judgment was rendered in favor of the relator and in accordance with the prayer of the petition.

T. L. Lamb and Green & Green, for appellant.

Geo. H. Ethridge, Assistant Attorney-General for the state.

SMITH, C. J., delivered the opinion of the court.

(after stating the facts as above.) The assignment of error filed herein does not present to us for review the ruling of the court below on the demurrer, so that we are not called upon to express an opinion relative thereto. The only error assigned is that:

"The circuit court erred in holding that there could be the creation of an out of the county depository when there was a bank in the county, ready, willing, and able to become depository upon the sole ground that the out of the county bank would pay more interest than the bank in the county."

Our county depository law was first enacted as chapter 137 of the Laws of 1910, and was amended by chapter 194 of the Laws of 1912 and by chapter 257 of the Laws of 1914. By the first two of these statutes power is conferred upon the board of supervisors of the various counties to appoint as county depository a bank located in an adjoining county, but only in event that no bank located in the county for which the depository is to be ap-

pointed shall qualify as such. It is claimed, however, on behalf of the relator that the law in this respect was amended by chapter 257 of the Laws of 1914 by which, it is claimed, power is conferred upon the board of supervisors to appoint as county depository any bank doing business either in the county for which the depository is to be appointed or in any adjoining county.

Section 1 of chapter 194 of the Laws of 1912 provides that:

"The amount of money belonging to the several current funds in the county treasury of each county in the state shall be kept on deposit in the state or national banks, or in some of them doing business in the several counties, provided that where there is no bank in a county qualifying as a depository, some bank in an adjoining county may qualify as a depository, and provided further, that in the event no bank qualifies as a depository, the funds belonging to the county shall be kept by the county treasurer, as now provided by law. All such deposits shall be subject to payment when demanded on warrant issued by the clerk of the board of supervisors on the order of the said board or on the allowance of a court authorized to allow the same, and each bank qualifying as such county depository shall be required to pay to the county for the privilege of holding the deposits, interest at the rate agreed upon, but in no event less than two per cent. per annum on the average daily balance kept on deposit in any depository."

Section 3 thereof provides that:

"Any bank in a county, or in an adjoining county where there is no bank in a county qualifying, may qualify as a county depository by placing on deposit with the county treasurer as security any of the following securities, . . ." etc.

These two sections in this regard are practically the same in both chapter 137 of the Laws of 1910 and chapter 194 of the Laws of 1912. Section 3 of chapter 137 of the Laws of 1910 provides that:

"The board of supervisors of each county at the November meeting, 1911, and annually thereafter shall give notice to all banks in their counties of the provisions of this Act and receive such proposals they or any of them may make for the privilege of keeping any part of the county funds and the security proposed; and said board shall place the deposit with the banks proposing the best terms, having in view the safety of such funds, and the terms made with each bank shall remain in force for one year."

By chapter 194 of the Laws of 1912 this provision of the statute was amended so as to read as follows:

"Sec. 2. The board of supervisors, at the regular December meeting in each year, and annually thereafter, shall give notice to all banks in their counties by publication of the provisions of this act, and at the following January meeting or some subsequent meeting, receive such proposals as they, or either of them, may make for the privilege of keeping the county funds or any part thereof and the security proposed and the said board shall cause the county funds to be deposited in the bank or banks proposing the best terms, having in view the safety of the said funds and the terms made with each depository shall remain in force for the current year, and until a new arrangement shall be made according to this act."

It will be observed that the amendments hereby made to the law of 1910 are: (1) The date for giving notices is changed from the November to the December meetings of the boards of supervisors; (2) that these notices shall be published; (3) that proposals from banks desiring to become county depositories shall be received "at the following January meeting or some subsequent meeting;" (4) and by providing that instead of remaining in force for one year "the terms made with each depository shall remain in force for the current year, and until a new arrangement shall be made according to this act."

Two of the defects in both these statutes were: (1) That no provision was made for notifying banks in the adjoining counties that the board of supervisors of any county intended to appoint a county depository so that the board could comply with that portion of the statute which provides that the money shall be deposited in a bank in an adjoining county in event no bank in the county shall qualify as depository; and (2) no provision was made for readvertising for bids when no response was received to the first advertisement therefor. In 1914 a statute, being chapter 257 of the laws of that year, was enacted by which section 2 of chapter 194 of the Laws of 1912 was amended and two new sections added to the statute. This statute in full is as follows:

“Section 1. Be it enacted by the legislature of the state of Mississippi, that section 2 of chapter 194 of the Laws of 1912 be, and the same is hereby amended to read as follows:

“The board of supervisors at the regular December meeting in each year and annually thereafter, shall give notice to all banks in their county by publication of the provisions of chapter 194 of the Laws of 1912, and that a copy of said notices shall be mailed by the board of supervisors to each and every bank in adjoining counties, and at the following January meeting or some subsequent meeting, receive such proposal as they or either of them may make for the privilege of keeping the county fund or any part thereof, and the security proposed and the said board shall cause the county fund and all other funds in the hands of the county treasurer to be deposited in the bank or banks proposing the best terms having in view the safety of said funds, and the terms made with each depository shall remain in force for the current year and until new arrangements shall be made according to this act.

“Sec. 2. When no bid or offer is made by any bank in the county or in the adjoining county to qualify as a depositor at the January meeting the 110 Miss—10.

board of supervisors shall have the power to readvertise and to select depository in the manner provided by this act at any subsequent meeting of the board.

"Sec. 3. It shall be unlawful for any officer in any bank, or any other person to make an agreement of any kind with the intent and purpose of keeping any bank from bidding for county deposits whether such agreement be express or implied, and any person violating this provision shall upon conviction be fined not less than five hundred dollars nor more than one thousand dollars and shall be imprisoned in the county jail for not less than thirty days, nor more than six months."

It will be observed that the only amendments here made to the statute are that a copy of the notices that a county desires to appoint a county depository "shall be mailed by the board of supervisors to each and every bank in adjoining counties" and that the board shall cause, not only the county funds, but "all other funds in the hands of the county treasurer to be deposited in the bank or banks," etc.; that when no bid is received from any bank in response to the first advertisement the board shall readvertise therefor; and a penalty is imposed for obstructing the making of bids.

Sections 1 and 3 of chapter 194 of the Laws of 1912, by which it is made mandatory upon boards of supervisors to deposit the county money in a bank located in the county when such a bank shall qualify as county depository, are in no wise referred to in the Act of 1914, and therefore cannot be held to be amended thereby unless such a result follows by necessary implication or, in other words, unless the provisions of sections 1 and 2 of the Act of 1912 here under consideration are wholly incompatible with the provisions of chapter 257 of the Laws of 1914. If section 2 of the Act of 1912 had been in language identical with section 1 of the Act of 1914, it could not have been seriously contended that by the statute as then enacted the boards of supervisors were au-

thorized to cause a county's money to be deposited in a bank located in an adjoining county, if a bank in the county shall qualify as county depository; for it would have been beyond question that the provision requiring notices to be mailed to banks in the adjoining counties was simply for the purpose of enabling the board to comply with its duty of causing the county money to be deposited in a bank in an adjoining county when no bank in the county should qualify as a county depository. That this provision of the statute was inserted therein after the original was enacted should not, we think, change the construction thereof, unless it is clear from the whole statute that such was the purpose of the legislature. The only effect, in our judgment, of the amendment here in question, is to cure the defects hereinbefore pointed out in the statute as originally enacted. We are therefore of the opinion that it was not the purpose of the legislature to permit the county money to be deposited in banks in adjoining counties when a bank in the county shall qualify as county depository.

Reversed, and cause dismissed.

Reversed.

WELCH v. STATE.

[69 South. 770.]

1. CRIMINAL LAW. Trial. Instructions.

In a trial for assault with intent to commit rape an instruction that the strongest proof of the good reputation of the prosecutrix for virtue and chastity is the proof that no one had heard her reputation in this particular discussed before the alleged assault, was erroneous, because, besides being an instruction upon the weight of the evidence, the court treated the state's evidence as proof.

2. SAME.

Such an instruction was further erroneous in assuming that no one had heard the reputation of the prosecutrix discussed in this particular, especially when a number of defendant's witnesses testified to the contrary.

APPEAL from the circuit court of Itawamba county.

HON. CLAUD CLAYTON, Judge.

Arthur Welch was convicted of assault with intent to rape, and appeals.

The facts are fully stated in the opinion of the court.

J. A. & J. E. Cunningham, Brown & Cleveland and Julius E. Berry for appellant.

In the hurry of things this man failed to get a fair consideration at the hands of the jury because of the following erroneous instruction, to wit: "The court further charges the jury for the state that the strongest proof of the good reputation of the prosecutrix for virtue and chastity is the proof that no one heard her reputation in this regard discussed before the alleged assault."

This instruction singles out "the proof that no one had heard her reputation questioned" etc., and assumes that it had been proven that no one had heard it questioned, when in truth a great array of witnesses testified they had heard it questioned, and is error for assuming that such proof was not contradicted.

The instruction is reversible error for commenting on the weight of the evidence in telling the jury that "the strongest proof" (which is equivalent to saying that the evidence of the two Tharps, Deboe and Northington is the strongest proof of her good character). To support our contention, we cite and quote from the following authorities in point, to wit: Section 893, Anno. Code 1906, and citations thereunder.

In the case of *Hammond v. State* handed down by WHITFIELD, J., 21 So. 149, the following is said in point, rendering clear and sustaining our position, to wit:

“Good character of a defendant is of itself a sufficient fact from which a reasonable doubt of guilt may arise. The court had already charged the jury that the good character of a defendant was a fact they should consider, in connection with all the evidence in determining the guilt or innocence of the defendant. The charge was properly refused. This court said in *Coleman's Case* 59 Miss. 490: ‘Evidence of the good character of the accused should go to the jury as any other fact, and its influence in the determination of the case should be left to the jury, without any intimation from the court as to its value. The court should not tell the jury that satisfactory evidence of the good character of the accused is or is not sufficient to raise a reasonable doubt of his guilt.’ ”

In the case of *Powers v. State*, 21 So. 657, handed down by Chief Justice Wood, the court held an instruction error, which commented on the weight of evidence, and re-announced the above-quoted broad principle referred to as a guide to the *nisi prius* courts of this state, to wit:

“This charge informs the jury that in case of doubt, reasonable doubt, of course—of defendant's guilt, arising from the evidence then the defendant's good character may be turned to by the jury. Why turn to it at all, after doubt of guilt is ingendered by all the other evidence? And why permit evidence of good character to be offered at all, if it is only to be considered after doubt of the guilt has been generated by all the other evidence.

“In the case of *Coleman v. State*, 59 Miss. 484, this court said: ‘Evidence of the good character of the accused should go to the jury as any other fact, and its influence in the determination of the case should be left to the jury without any intimation from the court of its value. The court should not tell the jury that satisfactory evidence of the good character of the accused is or is not sufficient to raise a reasonable doubt of his guilt.’ ”

To sustain our view we quote the following short statement from 15 So. 890, delivered by Justice Wood, which

we think clearly settles the issue raised by this motion, to wit:

“The first instruction given for appellee is justly obnoxious to the criticism of containing a comment on the testimony of the two chief witnesses for the appellant, and as charging the jury on the weight of the evidence. The jury was informed by the court that the evidence of these witnesses was to be received with caution as the opinions of such witnesses, however honestly entertained, may be erroneous” etc.

The singling out of the witnesses supposed to have been expert witnesses (whether or not they were it is unnecessary for us to determine) for discrediting remark by the court, and the unfavorably contrasting their evidence with the other evidence in the case, was in disregard of section 732, Code 1892. The evidence of expert witnesses is to be received and treated by the jury precisely as other testimony. Its value may be very great, or it may be of little worth. It may be conclusive, or it may not be even persuasive. Its weight will be determined by the character, the capacity, the skill, the opportunities for observation, and the state of mind of the experts themselves, as seen and heard and estimated by the jury, and it should be added, by the nature of the case, and all its developed facts. *Lawson*, Exp. Ev. 240; *Humphries v. Johnson*, 20 Ind. 190; *Railroad Co. v. Thul*, 32 Kan. 255, 4 Pac. 352; *Thompson v. Ish*, 99 Mo. 160, 12 S. W. 510; *Carter v. Baker*, 1 Sawyer 512, Fed. Cas. No. 2472; *Stone v. Railroad Co.*, 66 Mich. 76, 33 N. W. 24. Reversed.”

The instruction under consideration here does just what is forbidden above, viz., it partially and favorably contrasts the evidence of the two Tharps, Deboe, and Northington with the evidence of the defendant's witnesses, who had heard the character of prosecutrix questioned and led the jury to understand that the statements of the state witnesses on this point were to be belived in preference to the statements made by the de-

fendant's witnesses regarding the same point, and of course, the question of character was a vital issue in the cause.

We cite another strong case in support of this view, handed down by Chief Justice Woods, 23 So. 370.

Cook, J., delivered the opinion of the court.

Appellant was convicted of an assault with intent to rape. The previous chaste character of the prosecutrix was put in issue, and upon this subject the evidence was in sharp conflict. The state's evidence was of a negative nature, while the evidence offered by the defendant was positive.

At the request of the state the court instructed the jury as follows:

"The court further charges the jury for the state that the strongest proof of the good reputation of the prosecutrix for virtue and chastity is the proof that no one had heard her reputation in this particular discussed before the alleged assault."

The giving of this instruction was error. *Coleman v. State*, 59 Miss. 484; *Hammond v. State*, 74 Miss. 214, 21 So. 149. Besides being an instruction upon the weight and value of the evidence the court treated the state's evidence as proof.

Again, it will be observed that this instruction assumes "that no one had heard her reputation in this particular discussed before the alleged assault." This assumption finds no support in the evidence, for the reason that a number of defendant's witnesses gave testimony quite the reverse of this *dicta* of the trial judge.

Reversed and remanded.

GULF & S. I. R. Co. v. BRADLEY.

[69 South. 666.]

1. DEATH. *Action for wrongful death. Limitations. Number of actions.*

Under Laws 1898, chapter 65, providing that actions for wrongful death should be commenced within one year after death. There was no saving clause in favor of any person and the court could not ingraft any such exception upon it.

2. DEATH. *Actions for wrongful death. Limitations.*

Laws 1898, chapter 65, provided that actions for wrongful death should be commenced within one year after the death, this statute was amended by Laws 1908, chapter 167, by eliminating such limitation. But even disregarding section 97, Const. 1890, which provides that the legislature shall have no power to revive any remedy which may become barred by lapse of time or by any statute of limitation, still the act of 1908 did not authorize the bringing of an action in 1913 for a death occurring in 1902, since the limitation contained in Laws 1898 was not merely a limitation of the remedy, but of the liability itself.

3. DEATH. *Actions for wrongful death. Limitations.*

Where a declaration alleged that in August, 1902, plaintiff's father, while in defendant's employ, was killed under circumstances that rendered defendant liable. That plaintiff was born in February, 1903; that on September 30, 1903, suit was filed by plaintiff's mother in her own behalf and on behalf of another child then living to recover for the injury sustained by such death; that on the same day a final judgment was rendered in favor of the mother and such child in settlement of such injuries; and that thereafter and before plaintiff's birth such judgment was paid; that plaintiff was not a party to such suit and in no way interested therein or in the recovery had therein by her mother and sister for their sole benefit. In such case, plaintiff predicated her right of action upon the cause of action for the death, and not upon an agreed settlement not fully performed and was therefore barred under Laws 1898, chapter 65, requiring actions for wrongful death to be brought in one year after death.

110 Miss.]

Brief for Appellant.

4. DEATH. Actions for wrongful death. Number of actions.

Under Laws 1898, chapter 65, providing that in actions for wrongful death, there shall be but one suit for the same death, which shall inure to the benefit of all parties concerned, it is immaterial that a child of deceased was not born when suit by her mother was instituted, since the limitation on the number of suits is without exception in favor of any person whatever.

5. ACTIONS FOR WRONGFUL DEATH. Number of actions. Good faith.

Even conceding that a former judgment in order to constitute a bar to another suit must have been rendered in good faith, and without collusion, yet where there is nothing in the declaration in the last suit which indicates collusion in the rendition of the first judgment, the mere fact that it was rendered on the same day that the declaration was filed is insufficient for that purpose.

APPEAL from the circuit court of Jones county.

HON. P. . JOHNSON, Judge.

Suit by Willie Emma Bradley, by next friend, against the Gulf & Ship Island Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

B. E. Eaton, for appellant.

This suit cannot be maintained for the reason that it was not instituted within one year from the time of the alleged wrongful death. For the purpose of avoiding confusion, the first count of the declaration as above set out will hereafter be referred to simply as the declaration, by reference to which, it will be seen that the wrongful death for which a recovery is sought in this suit occurred on the 15th day of August, 1902. The present suit was instituted on the twelfth day of February, 1913, as shown by the summons in the record and by the date of the filing of the declaration. But the only statute in effect when the death occurred authorizing a recovery for this wrongful death was section 663 of the Code of 1892, as amended by the Law of 1898, page 82. The amended section aforesaid was brought forward and appears

without change as section 721 of the Code of 1906. The provision of section 721 with reference to the time in which suit shall be brought is as follows: "But every such action shall be commenced within one year after the death of such deceased person."

At common law no right of recovery existed for the death of a person caused by the negligent or wrongful act of another and the first right of recovery grew out of the passage of Lord Campbell's Act in 1846, which serves as a basis of all subsequent acts allowing damages for a wrongful death. Every right of recovery is therefore a statutory right and in derogation of the common law. Every state in the Union has adopted the principle of recovery for wrongful death first contained in Lord Campbell's Act, with variations, however as to the time within which suit is to be brought and by persons entitled to sue and the damages recoverable in such suit. Until 1908 the period within which suit was required to be brought in Mississippi was one year, but this time restriction was omitted in the amendment to section 721 by the legislature at its session in 1908, Sheet Acts, p. 204. So far as my investigation has disclosed, Mississippi is now the only state which has entirely eliminated the provision as to the time in which suit is to be brought; the other states with possibly four exceptions having this time limit ranging from one to three years. However, as stated in the outset, since the death which is the basis of this suit occurred on the fifteenth of August, 1902, the amendment referred to above does not in any manner affect the right of plaintiff's recovery, and such right, if it exists, must be found in the unamended section 721 with its time period of one year.

It is the universal doctrine that the time limit inserted in all statutes of this character is not the usual and ordinary period of limitation but is, in and of itself, a part of the cause of action and is a limitation on the cause of action and entirely destroys it, if the right to sue is not exercised within the time provided. This doctrine is so

universal that it is both tedious and unwise to attempt a complete collation of authorities, but the subject is so covered in the case of *Amanda Rodman, admx. v. Missouri Pacific R. R. Co.* (a Kansas case), found in 59 L. R. A. 704, that it seems desirable to set out in full that portion of the opinion dealing with this time limit provision. This opinion cites many authorities and the authorities referred to so fully and amply sustain the decision of the court that this case may very justly be termed a leading case upon the subject. The extract from this opinion above cited begins on page 706 and is as follows:

“At common law, or in the absence of 422, no right of action would exist in this state in favor of any one to recover damages for the wrongful death of Rodman. *Mobile Life Ins. Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Dennick v. Central R. Co.*, 103 U. S. 11, 26 L. Ed. 439; *The Harrisburg*, 119 U. S. 199, *sub nom*; *The Harrisburg v. Rickards*, 30 L. Ed. 358, 7 Sup. Ct. 140. The general character and purpose of the act and the nature of the limitation therein contained, have many times received the consideration of the courts. This court, in *Hamilton v. Hannibal & St. J. R. Co.*, 39 Kan. 56, 18 Pac. 57, in considering the act of Missouri creating a right of action for wrongful death said: ‘The right thus conferred is a conditional one, and the plaintiffs in such action must bring themselves clearly within the prescribed conditions necessary to confer the right of action.’ In the opinion Mr. Justice JOHNSON says: “The provision designating when and by whom the suit may be brought is more than a mere limitation. It is a condition imposed by the legislature, which qualifies the right of recovery, and upon which its exercise depends. The supreme court of Missouri has recently examined and interpreted this statute, and, in an elaborate opinion reaches the conclusion that the right is a conditional one, and the condition, being annexed to the right as given in the statute modifies the same, and in fact forms a part of the right itself.” In

The Harrisburg, 119 U. S. 199, *sub nom*; *The Harrisburg v. Rickards*, 30 L. Ed. 358, 7 Sup. Ct. 140, Mr. Justice WAITE, who delivered the opinion of the court in speaking of the statutes of the states of Massachusetts and Pennsylvania said: "The statutes create a new legal liability, with a right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . It matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes and the limitations of the remedy are, therefore, to be treated as limitations of the right." In *Boston & M. R. Co. v. Hurd*, 56 L. R. R. 193; 47 C. C. A. 615, 108 Fed. 116, it is said: "It has been universally held that where a special statute of this character gives a remedy, with an express limitation in the statute, the limitation is inherent in the right of action, and follows the remedy wherever there is an attempt to obtain it." In *Taylor v. Cranberry Iron & Coal Co.*, 94 N. C. 525, it is held: "The provisions of this statute limiting the time within which the action must be brought is not a statute of limitations. The statute confers a right of action which did not exist before, and it must be strictly complied with. As there is no saving clause as to the time of bringing the action, no explanation as to why it was not brought will avail." Mr. Tiffany in his work on Death by Wrongful Act (121), says: "These special limitations differ in some respects from those created by the ordinary statutes of limitation. Inasmuch as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but is of the right of action itself. The right is given subject to the limitation, and a subsequent change in the period of lim-

itation will not extend the period so as to affect an existing right of action." In 8 Am. & Eng. Ency. Law (2 Ed.), p. 875, it is said: "It seems that provisions in the statutes authorizing actions for wrongful death, which limit the time within which the actions shall be brought, are not properly statutes of limitation, as that term is generally used. They are qualifications restricting rights granted by the statutes, and must be strictly complied with. As the statutes confer a new right of action, no explanation as to why the suit was not brought within the specified time will avail, unless the statutes themselves provide a saving clause." See, also *George v. Chicago, M. & St. P. R. Co.*, 51 Wis. 603, 8 N. W. 374; *Hanna v. Jeffersonville R. Co.*, 32 Ind. 113; *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997. The precise question here under consideration arose in *Gerren v. Hannibal & St. J. R. Co.*, 60 Mo. 405. It is there held: "Under No. 5 of the damage act, the new suit brought against a railroad after nonsuit must be commenced within one year after the date of the injury. Section 19 of the chapter containing limitations . . . authorizing the commencement of a new action within a year from the date of nonsuit, has no application to causes, the time for bringing which is not 'prescribed' by that chapter . . . but otherwise limited." Also, in *Lake Shore & M. S. R. Co. v. Dylinski*, 67 Ill. App. 114, it is held: "Actions for damages resulting from the death of a person caused by the wrongful act of another may be commenced within two years after such death. The time is not extended by a nonsuit in a previous action." Many cases have arisen in which it has been held that minority or other legal disability of the party entitled to bring and maintain the action will not operate to extend the time prescribed in the statute for the bringing of the action, in the absence of a saving clause in the act itself. *Foster v. Yazoo & M. Valley R. Co.*, 72 Miss. 886, 18 So. 380; *Murphy v. Chicago, M. & St. P. R. Co.*, 80 Iowa 26, 45 N. W. 392; *Best v. Kinston*, 106 N. C. 205, 10 S. E. 997; *O'Keif v. Memphis & C. R. Co.*,

99 Ala. 524, 12 So. 454; *Louisville & N. R. Co. v. Sanders*, 86 Ky. 259, 5 S. W. 563. In *Beebe v. Doster*, 36 Kan. 666, 14 Pac. 150, this court held the general provisions of the statute of limitations ineffectual to extend the special limitation of five years contained in No. 141 of the tax law, providing for the bringing of an action to recover lands sold for taxes, notwithstanding the nonresidence of the defendant. It has also held that the contractual limitation contained in a policy of insurance is not governed or controlled by the general statutes of limitations. *Mc Elroy v. Continental Ins. Co.*, 48 Kan. 200, 29 Pac. 478. A review of the authorities bearing upon the question controverted compels us to hold that the scope and effect of the act above quoted is not merely to provide a remedy for a cause of action existing independent of the act itself but to create a cause or right of action where, prior to the passage, or in the absence of the act, none existed. As a part of the right of action itself, as a condition imposed upon and in limitation of the exercise of the right granted, it is provided that the action upon which recovery is had must be commenced within two years from the time the right of action arose. No excuse pleaded for delay in the commencement of the action for more than two years will avail for the reason that no such excuse can, in law, be held sufficient. A limitation upon the time in which a pre-existing right of action may exist is governed by the general statutes of limitations, and, in consequence, falls within the saving provisions of section 23 above quoted. But this limitation in time of the commencement of the action here brought under the statute is imposed as a condition upon the exercise of the right itself, is special and absolute in its nature, and is unaffected by the general provisions of section 23.

We are cited by counsel for plaintiff in error to cases in which it is claimed that a doctrine contrary to the conclusion here reached is announced. We have examined the cases cited, and find but one in which the precise question here considered was either raised or de-

terminated. The exact question was presented and considered in the case of *Swift & Co. v. Hoblawetz*, 10 Kan. App. 48, 61 Pac. 969. No authorities are cited in its support, neither are reasons given for the conclusion reached. Its authority is denied.

It follows, the facts appearing upon the face of the petition, the demurrer lodged against it should have been sustained. Failing in this, the action of the trial court in sustaining a demurrer to the evidence offered by plaintiff, and entering judgment in favor of defendant, is right, and must be affirmed.

All the Justices concur.

This interpretation of the statute, that is, if the suit is not brought within the prescribed period, the cause of action is absolutely dead and no excuse will be accepted for the failure to have brought it within the time prescribed, is the doctrine in Mississippi as will be ascertained by reference to the case of *Foster v. Railroad Co.*, 72 Miss. 886.

Flowers, Brown & Davis and *Henry Hilbun*, for appellee.

The cases cited by counsel for appellant are not applicable to a case like this. They do not present the same facts and they are entirely different in every way. In those cases there had been nothing done to enforce the right of action until it was barred by the limitation found in the statute. It had not been pursued within the limit of a year, and the cause of action itself was dead. Here the facts are different. A settlement or adjustment was made within the year, and an unborn or posthumous child is demanding her portion of that settlement or adjustment. The Texas case referred to by counsel for appellant is on all-fours with the case at bar. The facts in the two cases are almost identical. In disposing of the point under consideration, the court said in that case:

"If the mother and only child sue and recover only the compensation awarded them by a verdict and as in this case another child sues, it cannot be precluded on the ground that one action has been brought by all the beneficiaries, or that one beneficiary has brought the action for all, because no such action has been brought. If it had it would be the one suit contemplated by the statute. The amount to which all the beneficiaries would be entitled, if at all, would be included in that suit, and another could not be brought, and a second judgment in whole or in part recovered against the same defendant. But if the amount of compensation of any one of the beneficiaries had not been included in such suit, and he is entitled to it, upon no principle of reason, should he be concluded by a judgment in which his rights were not considered. If the defendant is liable to three beneficiaries under the statute, the aggregate compensation to which they are justly entitled should be no greater, whether it be recovered in three suits brought by one, each one of them, is one suit brought by all." *Nelson by Next Friend v. Railroad Co.*, 11 L. R. A. (Texas) 391.

None of the cases cited by counsel for appellant deal with a situation of this kind. The case before the Texas court was similar in every respect to the case at bar, and it was there held that the posthumous child could recover her portion of the aggregate compensation to which they were all justly entitled to recover. It is not a new suit. The cause of action is not being presented here for the first time. Appellee is only asking for her interest. She is basing her claim on the former recovery as shown by the agreed judgment. This court has never said, and so far as we have been able to find, no other court has said that a posthumous child could not, after birth, recover its portion of a claim for damages for its father's death. But on the other hand the cases of *Hernon v. Railroad Co.*, 128 Pac. 727, *Nelson v. Railroad Company*, 11 L. R. A., 391, 22 Am. St. Rep. 81, both hold that there may be such a recovery. This being true, and

it further appearing that the rights of this appellee were not considered, and nothing was allowed her in the settlement which was made within the one year prescribed by the statute, she is entitled to recover an equal share with her mother and sister, and this share has not been paid. It is this one share of the settlement that she is asking for. It is not an attempt to recover twice for the same injury, or to permit a double recovery by any one of the heirs. This child has received nothing. Her rights were not considered, and she only demands of appellant that she be paid a sum equal to that paid to her mother and sister.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a judgment against appellant for damages alleged to have been sustained by appellee because of the death of her father while in appellant's employ, caused by the wrongful act of appellant's servants.

The declaration was filed in February, 1913, and alleges that on the 15th day of August, A. D. 1902, W. M. Bradley, appellee's father, while in appellant's employ, was killed by reason of the negligence of other of appellant's employees under such circumstances as rendered appellant liable in damages therefor, and continues:

"Plaintiff further says that she was born on the 28th day of February, A. D. 1903, and is a posthumous child of the said W. M. Bradley above mentioneed; that on September 30, A. D. 1902, a suit was filed in the circuit court of Jones county, Miss., by Lillian C. Bradley, in her own behalf and on behalf of Lorena Y. Bradley, her child, to recover damages for the injuries sustained by the death of the said W. M. Bradley as set out in this declaration; that on the same date—that is, September 30, 1902—a final judgment was rendered in said court against the Gulf & Ship Island Railroad Company, a corporation, and in favor of Lillian C. Bradley and Lorena Y. Bradley, her child. 110 Miss.—11.

rena Y. Bradley, for the sum of two thousand, five hundred dollars in settlement of the injuries sustained by the said Lillian C. Bradley and the said Lorena Y. Bradley; and that on November 7, 1902, before the birth of this plaintiff, said judgment was paid to the said Lillian C. Bradley and the said Lorena Y. Bradley.

"Plaintiff therefore says that she was not a party to the above-styled suit, in no way interested therein or in the recovery had therein by her mother and sister for their sole benefit, and therefore her rights in the premises were not adjudicated in said suit."

To this declaration a demurrer was interposed by appellant and overruled by the court. Appellant having declined to plead further, a judgment was rendered in favor of appellee for the sum of one thousand two hundred and fifty dollars; that amount having been agreed on by counsel for both parties as the amount of damages to be awarded in event the court should hold that the demurrer should be overruled.

The first ground of the demurrer is that:

"The declaration shows that a recovery is sought for an alleged wrongful death, and that the suit was not brought within the period of one year as was required by the statute in force and effect at the time of the alleged wrongful death."

The right of action for the recovery of damages for the death of a person caused by the wrongful act of another is purely statutory, and at the time of the death of Bradley, and for some years thereafter, was conferred and wholly governed by chapter 65 of the Laws of 1898, one of the provisions of which is that:

"Such action shall be commenced within one year after the death of such deceased person."

This provision of the statute contains no saving clause in favor of any person whatever, and the court is without the right to ingraft such an exception upon it. *Foster v. Railroad Co.*, 72 Miss. 886, 18 So. 380. That this statute was amended by chapter 167, Laws of 1908, by

eliminating the limitation hereinbefore set out, is immaterial, even if section 97 of the Constitution be left altogether out of view, for the reason that the limitation contained in the law of 1898 was not a limitation of the remedy merely, but a limitation of the liability itself. In *Tiffany on death by Wrongful Act*, section 121, cited with approval in *Rodman v. Railroad Co.*, 65 Kan. 645, 70 Pac. 642, 59 L. R. A. 704, it is said that:

“These special limitations differ in some respects from those created by the ordinary statutes of limitations. In as much as the act which creates the limitation also creates the action to which it applies, the limitation is not merely of the remedy, but is of the right of action itself. The right is given subject to the limitation, and a subsequent change in the period of limitation will not extend the period so as to affect an existing right of action.”

If the right is enforceable in another jurisdiction than that of the courts of the state which enacted the statute, the right will be enforced subject to the limitation. The statute of limitation need not be pleaded in defense, and, if the declaration shows that the action was not brought within the time limited, it is demurrable. That this limitation is of the liability, and that no exception can be alleged to excuse delay, was evidently the view taken of the statute by both the court and counsel in *Pickens v. Railroad Co.*, 92 Miss. 210, 45 So. 868, for the limitation was there availed of by the demurrer, and not by plea.

One of the contentions of counsel for appellee in this connection is that this suit does not come within the limitation prescribed by the statute, for it “is nothing more than a suit by appellee to recover her proportion of the settlement heretofore made of this claim.” By this statement we presume is meant that the suit is not on the original cause of action, but upon an agreed settlement thereof which has not been fully performed by appellant. We are not called upon to decide this point, for the reas-

on that the declaration, in clear and unmistakable terms, predicates the appellee's right to recover, not upon any agreed settlement, but upon the original cause of action; in fact, it discloses that the agreed settlement, if such the judgment heretofore rendered can be termed, was fully performed by appellant.

The second ground of the demurrer is as follows:

"The declaration shows that long previous to the institution of this suit there has been brought one suit, and that upon said suit there has been had a recovery by parties entitled to sue for the wrongful death for which plaintiff sues, and under the statute there can be no further recovery by any party or parties for said alleged wrongful death."

The point here raised has been ruled against appellee in *Pickens v. Railroad Co.*, 92 Miss. 210, 45 So. 868, and *Foster v. Hicks*, 93 Miss 219, 46 So. 533. The statute plainly provides that there "shall be but one suit for the same death, which suit shall inure for the benefit of all parties concerned." That appellee was not born at the time the first suit was instituted is wholly immaterial, for the limitation on the number of suits that can be instituted is without exception in favor of any person whatsoever. That some "of the parties concerned" in the recovery contemplated by such suit are not parties plaintiff therein is immaterial. *Foster v. Hicks*, *supra*.

But it is said by counsel for appellee that for the former judgment to constitute a bar to the present suit it must have been rendered in good faith and without collusion between the parties thereto. Conceding for the sake of the argument that this rule is sound, there is nothing in the declaration which indicates collusion in the rendition of the judgment. The mere fact that it was rendered on the same day that the declaration was filed is insufficient for that purpose. For all the court knows, two thousand, five hundred dollars was full compensation for the injury sustained.

Both grounds of the demurrer are well taken, and it should have been sustained.

The judgment of the court below is reversed, the demurrer sustained, and the cause dismissed.

Reversed.

CASTON v. PINE LUMBER COMPANY.

[69 South, 668.]

1. **TAXATION.** *Property taxable. Growing timber. Sale for non-payment of taxes. School lands. Conveyance of timber. Rights of purchaser.*

One person may own the land, and another may own the timber thereon, and the land may be separately assessed for taxation to the owner thereof, and the timber growing thereon may also be assessed for taxation to the purchaser of same.

2. **PUBLIC LANDS.** *School lands. Conveyance by lessee.*

The right of the lessee of sixteenth-section lands to use the timber thereon is limited, but a valid conveyance of this right can be made which would transfer whatever rights the lessee had to use the timber.

3. **SALE FOR NONPAYMENT OF TAXES.** *School lands. Conveyance of timber.*

Where the lessee of sixteenth-section land sold the timber thereon to one who had it separately assessed to it and paid the taxes thereon, but the owner of the leasehold interest in the land failed to pay the taxes on the land and it was sold for such taxes, and the purchaser of the timber obtained from the board of supervisors a conveyance of the timber. In such case the purchaser of the timber by paying its taxes thereon retained its rights to the timber, which was a sufficient basis for the contract with the board of supervisors, and it was therefore the owner of the timber. And the purchaser at the tax sale acquired only the soil but no right to the timber.

APPEAL from the chancery court of Covington county.
HON. R. E. SHEEBY, Chancellor.

Suit by E. G. Gaston against the Pine Lumber Company. From a decree in favor of defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Hirsh, Dent & Landau, for appellant.

T. Brady, Jr., and *Mayes & Mayes*, for appellee.

Cook, J., delivered the opinion of the court.

Complainant below, appellant here, claims title to certain sixteenth-section land in Covington county. It appears from the record that this land was legally leased in 1846 for ninety-nine years; that the leasehold interest in the land was sold for the nonpayment of taxes assessed against it for the fiscal year 1903, and appellant claims title, through mesne conveyances, to this tax title. The bill of complaint prays for a confirmation of this title, and also for damages for cutting and otherwise destroying the timber on the land.

Appellee, defendant and cross-complainant below, alleged that he was the owner of the timber, and bases his claim upon the fact that in 1902 and 1903 the land and timber were separately assessed; that, while the taxes on the land were not paid, the taxes on the timber were paid, and appellee through mesne conveyances is the owner of the original timber rights of the owner of the leasehold. In other words, defendant and cross-complainant did not deny that complainant was the owner of the leasehold interest in the land, but did deny that he was the owner of the timber growing thereon, inasmuch as the land and timber were separately assessed, and the taxes were paid on the timber. The record discloses that the board of supervisors in 1905 conveyed the merchantable timber on the land to one of defendant's predecessors in title.

The bill of complaint proceeds upon the theory that, complainant being the owner of the unexpired lease of the land, he thereby secured the right to sue for the value of the timber taken off of the land by appellee. Appellee contends that appellant is the owner of the lease only so far as the use of the land itself is concerned. Having only bought the unexpired lease of the land at the tax sale, he did not thereby obtain any right, title, or interest in the timber growing thereon; the timber right having been disposed of by the former lessee of the land.

It is settled law that one person may own the land, and another may own the timber growing thereon, and that the land may be separately assessed for taxation to the owner thereof, and the timber growing thereon may also be assessed for taxation to the purchaser of same. *Butterfield Lumber Co. v. Guy*, 92 Miss. 361, 46 So. 78, 15 L. R. A. (N. S.) 1123, 131 Am. St. Rep. 540; *Fox v. Lumber Co.*, 80 Miss. 1, 31 So. 583.

Appellant insists that the conveyances to the timber on the land were absolutely void, and relies on the following cases to support his contention, viz.: *Warren County v. Gans*, 80 Miss. 76, 31 So. 539; *Lumber Company v. Harrison County*, 89 Miss. 485, 42 So. 290, 873; *Lumber Co., v. State*, 97 Miss. 355, 53 So. 1.

These cases deal with the right of the lessee as against the beneficiaries of the sixteenth-section fund, and we do not construe them to mean that the lessee has no right in the timber upon the land leased, in the sense that he could not make a valid deed to whatever interest he might own in the timber. The right of the lessee to use the timber is limited, but we think a valid conveyance can be made of this right which would transfer whatever rights the lessee had to use the timber. Under certain circumstances, the rights of the lessee might be of considerable value.

So it appears appellant in this case is the owner of the leasehold of the land purchased at the tax sale, but it by no means follows that he is the owner of the timber. The

land was forfeited for taxes, but the timber was not, and it seems to logically follow that the separate owner of the timber could obtain from the board of supervisors a valid contract to remove same, as he already owned the lessee's interest.

The lessee and those claiming under him got all of the rights of the lessee. The lessee forfeited his right to the land when he failed to pay the taxes assessed against it, but the purchaser of the timber did pay the taxes separately assessed against the timber, and thereby retained whatever timber right he had, and it was this right that came down to the appellee, small in itself, but as a basis for a contract with the board of supervisors to remove the timber it may be of considerable value. The purchaser at the tax sale got just what was sold—the soil—because the owner had sold his rights and the title in the growing timber, and the purchaser had separately assessed this property and the taxes were paid. The only outstanding interest in the timber was vested in the board of supervisors for the benefit of the school fund, and by buying this right the appellee became the owner of all the merchantable pine timber.

We think, however, that the decree of the lower court should be modified to the extent of vesting the title to the merchantable pine timber alone, and decree will be entered here accordingly.

Affirmed.

SUTTER-VAN HORN CO., LIMITED, v. MISSISSIPPI HOME
TELEPHONE COMPANY.

[69 South. 996.]

SALES. Construction. Offer and acceptance.

Where a contract is to be formed by means of an offer by one party and the acceptance thereof by the other, there must be an unconditional acceptance of the offer, not only must the acceptance be unconditional but it must be identical with the terms of the offer. It must not vary from the proposal, either by way of omission, addition, or alteration. If it does, neither party is bound.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by the Sutter-Van Horn Co., Limited, against the Mississippi Home Telephone Company, begun in a justice court and appealed to the circuit court. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.
G. E. Williams, for appellant.

With reference to the acceptance of appellee's offer by appellant we admit that there is a variance between the offer and the acceptance, and we also acknowledge that there must be a meeting of the minds shown by the offer and the acceptance before a contract is created; but we submit that there can be a valid contract in which the offer and acceptance vary, so long as this variance is not material and does not change the contract between the parties with reference to the subject-matter in the offer.

In *Warren Bros. Co. v. King*, 96 Minn. 190, the plaintiff's letter to the defendant is as follows: "We will lay the surface on seventeenth avenue in Duluth under specifications on file in the board of public works, for the sum of one dollar and forty cents a square yard;

you to furnish the stone for the surface at the plant, we to furnish all other material and labor." To this the defendant replied, "I will accept the terms of your letter of June 24th, for the laying of the surface on seventeenth avenue East. Also for twenty-third avenue East should the contract be awarded you." The court said: "The mere fact that defendant added to this acceptance of plaintiff's proposition that he would give plaintiff the contract for paving twenty-third avenue East, should it be awarded him by the city, is wholly immaterial, and in no way changes the contract between the parties with reference to seventeenth avenue."

On page 35 of the record appellee's general manager, who signed the order for five thousand fans, plainly shows by his testimony that there was a complete meeting of the minds in the offer and acceptance, necessary to constitute a binding contract.

Flowers, Brown & Davis, for appellee.

The order was in writing. It called for only five thousand fans. The price one hundred dollars was expressly set out therein. The order, as stated on its face, was conditioned upon acceptance in New Orleans. It was never accepted. The letter of appellant dated January 30, 1912; accepting an order for five thousand fans and one thousand blotters is not an acceptance of this order. We need go no further than Volume 1 of the recent work on Contracts by Elliott, for authority in support of the action of the learned circuit judge in granting a peremptory instruction for the defendant in this case.

"The contract is complete when both parties have agreed to one and the same set of propositions. This is accomplished when, without fraud, duress or mistake, on the part of either party, one submits a proposition to which the other accedes, provided such acceptance neither takes from nor adds to the offer, but accepts it in every respect just as it stands." Elliott on Contracts, sec. 36.

"Before this can be done (both parties bound) there must be an unconditional acceptance of the offer. The assent must be absolute and final. The one who makes an offer cannot be bound by a conditional acceptance." Elliott on Contracts, sec. 37.

"Not only must the acceptance be unconditional but it must be identical with the terms of the offer. It must not vary from the proposed either by way of omission, addition or alteration. If it does, neither party is bound." Elliott on Contracts, sec. 38.

The commentator appends to the above sections of his valuable work a complete list of authorities supporting his text. We feel that we need go no further for authority; that we need not burden the court with a discussion of a question elementary in its nature. There never was an acceptance of the order and therefore no binding contract.

We of course recognize and concede the correctness of the rule announced in *Warren Bros. Co. v. King*, 96 Minn. 190, cited by counsel for appellant. In that case the offer was to lay the pavement on seventeenth avenue for one dollar and forty cents per yard. The defendant accepted by saying he would lay the pavement on seventeenth avenue for one dollar and forty cents per yard and added that he would also lay twenty-third avenue for the same price if it should be awarded him.

The court said, and it is readily seen, that this offer on the part of defendant to also pave twenty-third avenue if the contract should be awarded him amounted to no more than an offer on his part to also lay twenty-third avenue. It in no way affected the acceptance of the work on seventeenth avenue.

In the case at bar the order, which blank was furnished by the appellant, expressly stated that it was to be subject to acceptance by the home office of appellant at New Orleans. The home office instead of accepting it as given changes it and accepts it as carrying five thousand fans and one thousand blotters. Tantamount to saying

to appellee: "We will not accept your offer as given but will accept it, if you will add one thousand blotters to it." Then after realizing that they cannot force the blotters on appellee, they come in and try to stand on the original order and sue for "profits they would have made had they filled the order as given," something they never have agreed to do. We say it is elementary that there must be an unqualified acceptance and that there has been none in this case. Therefore the learned circuit judge was correct and the case should be affirmed.

SMITH, C. J., delivered the opinion of the court.

In January, 1912, appellee gave to one of appellant's traveling salesmen a written order for five thousand fans, subject to appellant's acceptance at its home office in New Orleans. Certain advertising matter was to be printed on these fans. Upon receipt of this order by appellant it wrote appellee as follows:

"We have your order given our Mr. Van Horn for five thousand fans and one thousand small blotters.

Fans\$100.00

Blotters 10.00 \$110.00

"We understand you were to send in copy for these fans at once, and beg to advise that same has not reached us; therefore request that you have same come forward at once."

Some days later, appellee wrote appellant, directing it to cancel the order for the fans. This appellant declined to do, and instituted this suit in the court of justice of the peace to recover damages which appellant is alleged to have sustained on account of appellee's refusal to accept the fans. At the close of the evidence in the court below the jury were instructed to find for appellee, and there was a verdict and judgment accordingly.

The contract here intended to be entered into was to be formed by means of an offer by appellee and the acceptance thereof by appellant. Before such a contract

can be formed, there must be an unconditional acceptance of the offer, and—

“not only must the acceptance be unconditional, but it must be identical with the terms of the offer. It must not vary from the proposal, either by way of omission, addition, or alteration. If it does, neither party is bound.” 1 Elliott on Contracts, secs. 37, 38; Lawson on Contracts (2d Ed.) sec. 25; *New York Life Insurance Co. v. Mary McIntosh*, 86 Miss. 236, 38 So. 775.

Tested by this rule, the letter of appellant to appellee was not an acceptance of appellee's offer, but, on the contrary, was simply a counter proposal on the part of appellant to sell appellee fans and blotters, which appellee had the right to accept or reject at its pleasure.

Affirmed.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
MARCH TERM, 1915.

WILLIAMS ET AL. v. MERIDIAN LIGHT & RY. CO. ET AL.

[69 South, 596.]

1. PLEADING. *Objections. Ruling on demurrer. Amendments. Street railroads. Public nuisance. Abatement. Special damages. Eminent domain. Compensation. Additional servitude. Actual damages.*

On an appeal from a judgment sustaining a demurrer to a bill only the bill and the last amendment thereto will be considered, since all questions eliminated from the bill by the various amendments thereto are waived, although such amendments were made in order to meet the rulings of the court in response to demurrers.

2. STREET RAILROADS. *Public nuisance. Abatement. Special damage.*
The laying of an additional track in a street does not constitute a public nuisance, from which abutting property owners sustain such special damage as will entitle them to the abatement thereof.
3. EMINENT DOMAIN. *Compensation. Additional servitude.*
The laying of a second track in the streets by a street railway does not impose an additional servitude upon a street for which the abutting property owners are entitled to compensation.
4. EMINENT DOMAIN. *Compensation. Actual damages.*

Under section 17, Constitution 1890, a street railway company is without power to construct or to operate a street railway in the streets of a municipality until compensation has first been made to the abutting property owners for any actual damages which will result to them therefrom, and an injunction will lie to prevent it from so doing.

APPEAL from the chancery court of Lauderdale county.
HON. SAM WHITMAN, JR., Chancellor.

Suit by F. W. Williams and others against the Meridian Light & Railway Company and others. From a judgment sustaining a demurrer to the bill of complaint, complainant appeals.

In March, 1912, appellants filed a bill in chancery, alleging that they are the abutting owners on Eighth street, the most popular and populous residence street in the city of Meridian; that said street is thirty-six feet wide between the curbs, and that the defendant street railway company operated a single track in the middle of the street for a number of years; and that said street railway company was desirous of laying a double track for a number of blocks along said street in front of the property owned by the complainants, who protested to the city authorities and to the street railway company against the double-tracking of said street, claiming that it would result in serious damage to their property, as well as subject them to great inconvenience. The bill alleges that with a single track on said street there is a space of thirteen feet on each side, between the cars and the curb, whereas with the double track there would be only eight and one-half feet on each side of the street, and that as a result of said double-tracking vehicles could not pass each other between the cars and the curb, horse-drawn vehicles could not be left standing near the curb, and aside from the fact that the car tracks would take up a large part of the street, complainants were greatly damaged and inconvenienced by the laying of said tracks, and by the digging up of said street, and the noise incident thereto, said work having been carried on both night and day; and since the double-tracking of said street larger cars ran on a five minute schedule, instead of every fifteen minutes, and made a great deal of noise, damaged complainants' property and complainants claim protection of section 17 of the Constitution of the state, which provide that:

“Private property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof, in a manner to be prescribed by law.”

The bill alleges that in October, 1910, the trustee in the mortgage securing the bonds of said street railway company had filed a bill against the street railway company, the city, and the complainants, and others, to restrain any interference to the construction of this double track which the street railway company desired to lay, and obtained an injunction, and under this injunction, that the street railway company had entered upon said street, dug it up, graded it, and proceeded to lay the double track in defiance of the rights of the abutting owners, and that said injunction was finally made perpetual by the federal court, and thereafter an appeal was prosecuted to the United States circuit court of appeals, and the decree of the lower court was reversed, the court holding that the United States district court had not jurisdiction and dismissing the bill, but in the meantime, under the protection of this federal injunction and before the case was reversed by the court of appeals, the double track had been laid; that the taking possession of the street in the manner described, and appropriating the same to the use of the street railway company, and laying the double tracks were willful, deliberate, and premeditated acts of trespass, in defiance of the rights of the abutting property owners. The bill further alleges that complainants have been subjected to great damage to their property, and besides have been forced to incur large expenses in attorney's fees, court costs, and expenses incident in contesting the various suits from this action by the street railway company.

The bill prays that the double tracks be declared to be a nuisance, and abated as such, and that the defendants be required to remove same and place the single track back in the street, and that complainants be awarded such damages as they have sustained, and that defendants be

restrained from using or operating said double tracks until all damages which may have been adjudicated shall have been paid. There was a demurrer to the bill as finally amended, which was sustained, and this appeal is taken.

Green & Green, for appellants.

In the suggestion of error, the counsel does not seem to understand the opinion of the court. The opinion answers the first two questions, namely: First, "Is the laying of the additional track in the street in question a public nuisance from which abutting property owners sustained such special damages as will entitle them to the abatement thereof?" Second, Does the laying of this second track impose an additional servitude upon the street; or, in its last analysis, does a street railway impose an additional servitude upon a street for which the abutting property owners are entitled to compensation?" The court holding:

"It seems to be settled by the great weight of authority that the first two of these questions must be answered in the negative in so far as they are governed by common-law principles alone."

The court then proceeds to interpret section 17 of the Constitution and the right of abutting property owners and holds that under section 17 of the Constitution, abutting property owners are entitled to damages incurred.

It is the change that section 17 has made in the common-law rule that is the predicate of the complainant's claim here. The court's questions are:

"(1). Under section 17 of the Constitution as applied to the case at bar in our former opinion can a street railway company be enjoined from laying or maintaining its tracks in the street of a municipality without first compensating the abutting property owners for any damage thereby inflicted upon them; and

"(2). Is this question presented by the pleadings?"

110 Miss.—12.

Answering both of these questions presented by the pleadings, is the right of an abutting owner to have the laying or maintenance of the tracks enjoined until and unless compensation is first made. The pleadings do not claim any decree for the amount of the damages, but confine the exercise of this jurisdiction to their right to the injunction until compensation is first made.

The chancery court, would not have the jurisdiction to exercise the power of eminent domain. This power is confided to a special tribunal created by statute and which has power only to ascertain the amount of damages. Resort must be had to the chancery court for an injunction against the right to exercise eminent domain to condemn, and the chancery court must, before, and even after, the amount of damages has been ascertained in eminent domain proceedings, declare whether the right to exercise eminent domain proceedings in the corporation actually exists.

In *Lumber Company v. The Railroad*, 89 Miss. 84, it was held that the special court of eminent domain was only organized to determine the amount of damages and has no jurisdiction to determine the question of the right of the plaintiff to condemn the land, and there it was held that it was proper to enjoin the proceedings in condemnation until the right to condemn was ascertained. The court says, page 113:

“Since neither the constitution nor the statutes provide a particular tribunal in which to try the question of whether or not the use for which private property is to be taken is a public or private use, and since it is made a judicial question by the constitution, when it is sought to try the question, it must be by injunction, and in the chancery court, enjoining the entry upon or appropriation of the land, because the use for which land is sought to be taken is not a public use.”

It is beyond the power of the Legislature, much less a municipality, under section 17 to permit the property of the abutting owner to be damaged without compensation

first made, and injunction, either before or after the injury is done, is the proper remedy until and unless the corporation shall resort to eminent domain proceedings to ascertain the amount of damage and to pay that damage before the injury can be inflicted. *Thompson v. Grand Gulf Railroad Company*, 3 How. (Miss.) 240; *Stewart v. Raymond R. R. Co.*, 7 Sm. & M. 568; *Railroad Company v. LeBlanc*, 74 Miss. 650, 674.

Here the case is on demurrer to this court, and this court has overruled the demurrer and upon remand, if it shall appear that complainants are entitled to the relief prayed—if the facts charged in the bill are true—then under this rule, it would be the duty of the chancellor to grant the injunction as prayed, but to stay the enforcement of the injunction until the railroad company could have an opportunity to institute eminent domain proceedings to ascertain the amount of damages which had been sustained, and which must, first, be paid by it, before it could lawfully occupy the street. The rule of *Thompson v. Grand Gulf Railroad & Banking Company*, 3 How. (Miss) *supra*, has been followed in a number of cases. *Pearson v. Johnson*, 54 Miss. 263; *Laurel v. Rowell*, 84, Miss. 435; *Board of Supervisors v. Lumber Company*, 103 Miss. 324; *Levee Commissioners v. Dancy*, 65 Miss. 341.

The result is, that the chancery court has jurisdiction to grant this injunction, and should do so; and, as stated, in granting it require that the Railroad Company should institute eminent domain proceedings to ascertain the amount of damages done to the abutting property owners, and when this is ascertained and paid, then the decree for quiet enjoyment, as was the rule in 7 Sm. & M., *supra*, should be made.

It is immaterial that under the direction of the chancellor, suits at law were brought by the abutting owners to ascertain the damages, for these suits by the property owners are improper methods of deciding the amount of damages, and cannot affect the right of injunction in

equity to define the nature and extent of the use (84 Miss. *supra*,) and then to restrain until the damages are ascertained and paid.

This should be done by the railroad impetrating eminent domain proceedings under the special remedy provided by the Code, and, as held in cases, *supra*, the property owner is not required to do anything to assert his right to damages and cannot lose it by inaction or non-action.

In the *King case*, 88 Miss. 456, there was an action at law for the damages. That case did not involve the jurisdiction in equity by injunction to restrain the exercise of the public use until compensation is first ascertained and paid.

The *Slaughter case*, 91 Miss. 251, was for injunction and damages. Here under the demurrer of appellee the chancellor has dismissed the bill as to the damages, and it stands squarely upon the right of injunction until compensation shall be first made, as held in 7 S. & M., *supra*.

Therefore, the decree, as heretofore rendered in this court, should stand.

G. Q. Hall & Jacobson, for appellants.

Without regard to whether a car line laid and operated in the street constitutes an additional servitude, the taking, destruction or impairment of the easement of ingress and egress, or of other rights appurtenant to abutting property, constitutes an actionable wrong, preventable by injunction, and abatable at the suit of the abutting property owner.

This was expressly and conclusively settled as the law in this state, in a similar controversy between Mrs. Mackie Slaughter against this identical company (95 Miss. 251, 98 Miss. 420), where one line of track was built in Twelfth avenue, so as to render Mrs. Slaughter's premises abutting thereon inaccessible, save with diffi-

culty and danger, and so as to interfere with the passage of vehicles along said street when cars were passing.

Now, a nuisance is defined to be: "Anything that unlawfully worketh hurt, inconvenience or damage." 3 Bl. Com. 216.

"That class of wrongs that arise from the unreasonable, unwarrantable or unlawful use by a person of his own property, either real or personal, or from his improper, indecent, or unlawful contract, working an obstruction of, or injury to the right of another, or of the public, and producing such material annoyance, or inconvenience, discomfort or hurt, that the law will presume a consequent damage. Wood on Nuisance; sec. 1. See Black's Law Dictionary, "Nuisance."

The Blackstone definition is said by Judge COOLEY (Cooley on Torts, p. 565) to embrace not a mere physical injury to the property, but any injury to the owner or possessor as respects his dealing with, possessing or injuring it. Interference with the public and common rights creating a public nuisance, when accompanied with special damages to the owner of the land, also gives a right of private action. The public nuisance as to the person who is specially injured thereby in the enjoyment or value of his lands, becomes a private nuisance also. Cinders, ashes, dust, fumes, noise, obstructions of access and vibrations, produced by another, are actionable as nuisance, 29 Cyc. 1184, 1190. *King v. Railway Co.*, 88 Miss. 456; *L. N. Terminal Co. v. Lelleyett*, 1 L. R. A. (N. S.) 49; *Rainey v. Red River, etc. R. R. Co.*, 89 S. W. 768.

The constitutional restrictions prevent the legislature from surrendering or giving away the property rights of private citizens. Its power of eminent domain, may in case of public necessity, compel the citizens to submit to the continuance of the business, and exchange his property for money, but the legislature cannot deprive him of that. In every case, the inquiry primarily is: Has a legal right which forms part of the value of the injured

property been infringed? Sec. 17 of the Constitution, denies legislative power to fix the use as public, and makes it a judicial question.

The fact that it has the legislature's permission to permit the act will not deprive the property owner of the right of money compensation.

But this court has held in the *Slaughter case, supra*, that this is subject to the limitation that private rights cannot be thereby impaired with impunity, and that the laying and operation of its lines, so as to unduly interfere with the use of the street for the ordinary purposes of travel, and the undue interference with the abutting property owners' use and enjoyment of their own, constituted a nuisance, abatable at his instance, and entitled him as well to due compensation in damages.

In Cyc. 29, 1214, the remedies against nuisance are set out to be: First, right to abate without legal process; second, suit in chancery for abatement of or injunction against; third, action at law for damages; fourth, criminal prosecution against the person maintaining it. On page 1215 it is said that an individual may, by his own act, abate a public nuisance causing him special injury.

Equity relieves whether the nuisance be public or private. Such proceedings for relief against a private nuisance should be brought in the name of the party injured; and one specially injured by a public nuisance is entitled to sue for relief in his own name, or if there are others similarly affected, all or any may join. 29 Cyc. 1237, 1238, 1257, 1261. See, also, *Ib.*, 1219, 1234.

The chancery court should, in granting relief against a nuisance, award plaintiff damages for the injuries sustained during its continuance. 29 Cyc. 1251 and 1254. (98 Miss. 420)

Street Car Line, Whether an Additional Burden.

Does a street car line, operated by electricity, constitute an additional burden on the street? This court, on the 18th of January, 1909, in an unanswerable opinion

by Judge MAYES, responds in the affirmative. *Slaughter v. Meridian Light & Railway Co.*, 95 Miss. 251.

The easement of ingress and egress of the property owners in the street and his rights to the use of such street in connection with his property, is held to be property. 1 Am. & Eng. Ency. Pl. & Pr. 218; *Hart v. Buckner*, 54 Neb. 219; *Muller v. N. Y. & H. R. R. Co.*, 197 U. S., 544; *Chicago v. Taylor*, 125 U. S. 161; *Vicksburg v. Harmon*, 72 Miss. 211; *Raney v. Hinds County*, 78 Miss. 271.

In the *Theobald* case, 66 Miss. 279, decided before the adoption of the Constitution of 1890, the court said: "A street is a public thoroughfare or highway, established for the accommodation of the public generally, in passing from place to place, and for such other incidental uses as are ordinarily made of public streets, such as laying drains, sewers, gas, and water pipes and the like. Public streets are for the use and benefit of all and no one has any exclusive rights and privileges therein. They are free to all upon like conditions, and subject to use by any means of locomotion which is not destructive of the common uses and ordinary methods of travel. If this is true, a railroad does not fall within the purpose for which public streets were originally established, and the occupation of a public street by a railroad is an additional servitude on the land, and a perversion of the street from its original purposes.

The introduction of a new motive power, would not, perhaps, be material; but a railroad requires a permanent structure in the street, the use of which is private and exclusive. It confers upon an individual or corporation, rights and privileges in the streets, which are incompatible with those of the public and adjacent proprietors. To hold that a railroad is one of the legitimate uses of a public street, leads to the inconsistency that the street may be monopolized by a corporation or an individual and filled with parallel tracks which would practically exclude all ordinary travel and still be said to be devoted to the ordinary uses of a public street. "Lewis

on Eminent Domain, sec. 111; I Hare Const. Law, 362."

The Bloom case was brought to this court after the change in the organic law of this state. The Alabama & Vicksburg Railway Company, under a license from the municipality of Jackson, constructed a track along the public streets, without making compensation for any consequent damages to abutting property owners.

Says the court, quoting from the syllabus: "Railroad companies cannot escape liability under sec. 17, Constitution 1890, merely because the damages to such abutting owners are only such as necessarily and naturally arise from the proper management and conduct of its trains on said track."

Again it says: "If the construction and maintenance of the switch and the uses to which it is devoted by defendant, render the ordinary use and occupation of the property physically uncomfortable to plaintiff, he is entitled to recover such damages as will compensate for the consequent discomfort and inconvenience, if any, he has suffered in the enjoyment of his property. "*Peck v. Schenectady R. Co.*, 170 N. Y. 278; 3 Abbott, Municipal Corporations, sec. 845, where the opinion by Judge MILLER is extensively quoted from *Detroit Ry. Co. v. Mills*, 85 Mich. 634.

It follows from the enunciations in the three several opinions in said cause: That whether the building of a street car line in a street gives a right of action to the abutters, is not dependent upon whether or not, as an abstract proposition, it constitutes an additional burden on the street. Whether it does or not, is immaterial to the rights of the abutter, to recover any damages sustained by him, by reason of its location and operation therein, and to have it abated as a nuisance.

The right of street use for street car purposes is at most a qualified one.

Says Mr. Abbott: "The abutting owner, irrespective of his interest in the adjoining highway is entitled to compensation of that highway by a surface street railway

when that use interferes with or destroys the easement, which as possessor as an abutting owner in the access to his property, and to air and light. These easements are property rights, and when an unauthorized use of a highway impairs or destroys them, then compensation can be recovered." 3 Abbott, Municipal Corp., sec. 5847; 2 Lb. 820.

The rights of a street railway company to the use of a street is a qualified one and subject to the implied condition, that the highway shall not be used in such manner to destroy its proper and legitimate use by the public at all times.

3 Abbott Municipal Corp., p. 2017, sec. 851, note 778; *McQuaid v. Portland etc. R. Co.*, 18 Or. 237; *Pennsylvania R. Co. v. Walsh*, 1 Pa. Dist. 121; *Campbell v. Metropolitan Ry. Co.*, 82 Ga. 320; *Dooly v. Salt Lake City, etc., Co.*, 9 Utah. 31, 24 L. R. A. 610; *Campbell v. Metropolitan Street R. Co.*, 28 Ga. 320; *Elizabethtown, etc., R. Co. v. Combs*, 10 Bush. 392, 19 Am. Rep. 67; *Cincinnati, etc., Ry. Co., v. Cumminsville*, 14 Ohio St. 523; *Cincinnati, etc., Ry. Co., v. Cumminsville*, 14 Ohio St. 523; *Dooly v. Salt Lake etc. R. Co.*, 9 Utah 31, 24 L. R. A. 610.

By way of summoning up in conclusion, we submit: (1) That the true rule which should be adopted in this state is that announced and contended for in the Mays opinion in the Slaughter case (a) That was subscribed to by the unanimous court. (b) It has never been held by this court to be unsound, but only as unnecessary for decision. (2) Under the familiar principles that one must use his own or exercise a right so as not to inflict an injury on another.

Baskin & Wilbourn, for appellee.

The question propounded by the court on the suggestion of error, filed by the counsel for appellee, are these: " (1) Under section 17 of the Constitution, as applied to the case at bar in our former opinion, can a street rail-

way company be enjoined from laying or maintaining its tracks in the streets of a municipality without first compensating the abutting property owners for any damages thereby inflicted upon them." and, "(2) Is this question presented by the pleadings?"

It is manifest from the record that the appellants have stricken from the amended bill the prayer for the allowance of damages and, to use the language of the pleader, they "have proceeded to the redress of their several and respective wrongs in that regard by separate suits in the honorable circuit court of Lauderdale county."

Necessarily, therefore, all questions as to the fact of damages and the amount to be recovered therefor, and the recovery and collection of said damages, were eliminated from this present suit, and the appellants elected to pursue their remedies in respect thereto in the circuit court of Lauderdale county, Mississippi.

It is not disputed that that court has jurisdiction of such suits. It cannot be contended that if any legal damages have been sustained they are not cognizable by the circuit court of Lauderdale county, Mississippi, and recoverable there, if at all.

The court, in the opinion formerly handed down in this case, has held, though we think it was unnecessary to pass on the question at all, and it was not really involved, that they could recover such damages as they might actually show that they had really sustained by reason of the fact of the laying of a double track in eighth street.

Since the tracks are not an additional servitude upon the street, as held by this court, and since their presence in the said street does not amount to a nuisance, and since the laying of street car tracks in a street is a legitimate use of such street, the only possible sort of actual damage that appellants would be entitled to, if they were entitled to any, would be, nominal damages, if any at all.

When a party claims that the making of a public improvement in a street or highway results in consequential damages to adjoining property, it certainly must be

conceded that the party whom it is claimed has caused such consequential damages would have the right to deny that any such consequential damages, had resulted from the act complained of.

And where the party claiming such consequential damages has invoked the judgment of another court to determine whether or not such consequential damages have been sustained, and to ascertain the amount of them, this court, which is not asked to assess any damages, and is notified by the pleadings that another court has been applied to for redress in that regard, ought to leave the question of damages alone to be settled between the parties by the court whose jurisdiction these appellants have already invoked.

In other words, these appellants notified this court, and the court below, through their pleadings, that they have gone into another forum to have the issue of damages *vel non* determined and amount of damages, if any, assessed. And when this court is so advised, we submit, it not only should not, but cannot make any order with reference to those damages.

Counsel for appellants, in their brief, contended an injunction against the appellee, restraining it from maintaining its tracks in the streets of the municipality, until it first compensates owners for damages thereby inflicted upon them, should be granted, and the street railway should be required to institute eminent domain proceedings to ascertain the amount of damages done to the abutting property owners.

We submit the court, not only should not, but cannot render any such decree, for several very sufficient reasons, as it seems to us.

In the first place, the Meridian Light and Railway Company, nor any other street car company for that matter, has any right of eminent domain under the laws of Mississippi, as to any municipal street.

Indeed we submit that it was never regarded as necessary to confer the right of eminent domain upon a street

railway as to the streets, alleys, avenues and lanes of a city, because the laying of such tracks in such streets, alleys, avenues and lanes of a city was recognized as a legitimate use of the same, and as not being an additional servitude, and because it was thought and considered that a municipality should regulate and control street railways in its streets just like they would regulate hack lines, omnibuses, and other means of locomotion over and along the streets.

In Lewis on Eminent Domain, section 161, the view of this court as announced in the opinion in the case at bar, is laid down by the author as meeting with the very unanimous concurrence of the courts of the land. And, as we construe the court's opinion, it aligns itself with the practically unanimous voice of the courts of the United States. But since the Constitution of 1890, the court now holds, simply that he may recover any actual damage sustained, even though it result from a legitimate and public use of the street.

But there must still be an actual and legal damage done to the property, and the party whom it is claimed did the damage, is not denied the right to controvert the fact of damage as well as its amount; and where, as the appellants have done in this case, the party claiming to have been aggrieved proceeds in a proper forum for the recovery of his damages, parties there litigant should be allowed to try out the issue as to damages *vel non* in the forum that the aggrieved party has chosen to submit his claims to. *Thompson v. Grand Gulf Railroad & Banking Company*, 3 Howard 240.

It cannot be said in this case, the case at bar, that an action at law would give no adequate relief. It is not contended that the appellee is insolvent. It cannot be said that no compensation can be had at law for any actual damages, if any have been sustained.

The very fact that the appellants have asked a court of law to award them damages, shows that damages may

be recovered, if shown to exist in such proceeding, according to the view of appellants themselves.

Nor can it be said in this case that the nature of the injury complained of is such that a preventive remedy is indispensable. In the case at bar, the court knows from the record that the parties are litigating over the fact of damages *vel non* in another court.

In the case of *Board of Supervisors v. Railroad*, 103 Miss. 324, cited by counsel for appellant, it is held "while ordinarily the complainant is required to establish the fact of injury by an action at law, before a court of equity will interfere, yet where the injury is manifest, the right clear, and the nuisance a continued one, or constantly recurring, and satisfaction can only be had by repeated suits at law, a court of equity is the proper tribunal to relieve." *Lerned v. Hunt*, 63 Miss. 373.

It cannot be said in the case at bar that the injury claimed to result from the laying of the track in Eighth street is manifest, nor that relief in the matter is clear. Many of the conditions complained of by the appellants in Eighth street as result of laying the double track, are matters which the *Smyer case* in 61 So. 358, which this court has approved, holds are not proper elements of damage.

With the claims for damages stricken out by the appellants in this case, this court cannot say, or hold, or find what sort of damages if any, we submit, should be recovered, and we submit this court ought not to pass, in this case, on any question involving the question of damages which the appellants have eliminated from this case, and which the appellants in this case have notified the court they are litigating in another forum.

In a condemnation proceeding, as we understand the effect of the decision of this court, in *Railroad v. Lumber Company*, 89 Miss. 84, the only issue involved is the issue as to the amount of damages. Not the fact of damages *vel non*; not the issue as to the right to take the property; not the issue as to whether or not the use is a pub-

lic one; but solely and alone an issue as to amount of damages.

We must submit that this is peculiarly a case, where before the jurisdiction of equity to restrain can be invoked, appellants must establish the fact of damages and the amount thereof in a proceeding at law, which is the very thing they are undertaking to do and that any effort, if the question were in this record, to invoke such injunctive relief as restraining operation of cars until the damages should be first assessed and paid, is premature.

There is no case cited by our friends for the appellants, holding that under the facts of this record such injunction as they ask in their brief, in response to the inquiry of the court upon the suggestion of error could be granted.

The case of *Railroad v. LeBlanche*, 74 Miss. 650, is totally unlike the case at bar. That case involved the title of a right-of-way of a railway, which the supreme court held was not good. Under no conceivable theory under the attitude of this record, as we see it, could the chancery court on remand of this suit, grant any injunction against the operation of the street cars over the double tracks on Eighth street. And this court has expressly held already that they would not be abated as a public nuisance. The case of *Pearson v. Johnson*, 54 Miss. 264, has, as we submit, no application to the facts in the case at bar. The case of *Laurel v. Rowell*, 84 Miss. 435, is not applicable to the case at bar.

It appears that in the case of *Leflore County v. Cannon*, 81 Miss. 334, Judge CALHOUN was careful to state not only that the board of supervisors was about to dam up the stream but that in doing so irreparable injury would have been inflicted. After making these statements, then follows the second portion of the quotation found on page 7 of the brief of the counsel for appellant. That second quotation on page 7 of the counsel's brief while a quotation from 103 Miss. 342, is in fact taken from Judge

Calhoun's opinion in the case of *Leflore v. Cannon*, 81 Miss. 334.

The first paragraph quoted from *Board of Supervisors v. Lumber Co.*, 103 Miss. 340, comes after Judge REED's announcement that it is settled in this state "that the chancery court has jurisdiction to grant an injunction to restrain a person from damming a bayou, or other natural outlet or stream, where the injury resulting from such obstruction is manifest and continuous, or constantly recurring and the right of relief in the matter is clear."

It will also be noted that Judge REED says at the bottom of page 340, 103 Miss., as follows: "It cannot be said that the board of supervisors are proceeding in this case under the right of eminent domain. Nothing has been done looking to the ascertaining and paying to the appellees the amount of compensation to which they would be entitled, which is required by section 17 of the Constitution. And it cannot be said that the appellees have not shown such individual and special damages arising from the construction of the levee as to give them the right to proceed to abate what might be claimed to be a public nuisance." The case of *Levee Commissioners v. Dancy*, 65 Miss. 341, has no application, we submit, to the facts of this record.

In the case of *Birmingham Street Railway Co. v. Smyer*, 61 Miss. 358, approved by this court, it is pointed out in the statement of the case by the judge who handed down the decision that Alabama has a constitutional provision substantially the same as ours.

That constitutional provision provides for compensation for property taken, injured or destroyed; and that such compensation shall be paid before the taking, injury or destruction of such property; and the court held, in *Birmingham Railway, Light & Power Co. v. Smyer*, *supra*, that the complainant Smyer was not entitled to any injunctive relief.

In *Pearman v. Wiggins*, 103 Miss. 4, and especially at page 12, Justice REED, quoting from *Green v. Lake*, 54

Miss. 540, says: "The complainant must sustain a special or peculiar damage, an injury distinct from that done to the public at large. Irreparable injury lies at the foundation of relief in equity, which must be so great as to be incapable of compensation in damages."

Not to protract this brief any further, we submit, in the first place that the question propounded by the court on the suggestion of error, is not presented in this record; and, in the second place, if it were under the facts of this record and the decisions of our court and the rules governing the granting of injunctive relief and the decision of the court in the particular case at bar, no injunction could properly be granted against the operation of the cars upon the double tracks in Eighth street; and that there is no injunctive relief to which the appellants are, or would be entitled; and that the question of damages is not involved in this record; and that instead of this case being reversed and remanded, as result of the court's decision, it should be affirmed without prejudice to the pending suits of the appellants for the recovery of damages; and also without prejudice to the right of defense to such suits as the appellee may have.

SMITH, C. J., delivered the opinion of the court.

The case presented to us for decision is that made by the bill and the last amendment thereto, for all questions eliminated from the bill by the various amendments thereto are waived although such amendments were made in order to meet the rulings of the court in response to demurrers (31 Cyc. 465; *Brasfield v. French*, 59 Miss. 632), so that no question raised in the court below by any of appellee's various demurrers, other than the last, will be here considered. Three of the remaining questions referred to in the brief of counsel for appellant are not raised by the allegations of either the original or amended bill, and therefore are not presented to us for decision. These are: First, that the city of Meridian is without

power to grant a street railway franchise; second, conceding that the city has this power, that the ordinance by which the franchise in question was granted is void; and, third, that the charter of incorporation of appellee, the Meridian Light & Railway Company is void.

The only questions raised by the pleadings, as we understand the record, are: First, is the laying of the additional track in the street in question a public nuisance, from which abutting property owners sustain such special damage as will entitle them to the abatement thereof? Second, does the laying of this second track impose an additional servitude upon the street; or, in its last analysis does a street railway impose an additional servitude upon a street for which the abutting property owners are entitled to compensation? Third, should both of these questions be answered in the negative, in event actual damage results to the abutting property owners by reason of the laying of this second track, are they entitled to compensation therefor under section 17 of the Constitution?

It seems to be settled by the great weight of authority that the first two of these questions must be answered in the negative, in so far as they are governed by common-law principles alone. The case of *Slaughter v. Railway Co.*, 95 Miss. 251, 48 So. 6, 1040, 25 L. R. A. (N. S.) 1265, and 98 Miss. 420, 53 So. 952, is not in conflict with this view, for in that case the street involved was so narrow that the use by a street railway company of even a single track therein practically excluded all others from using the street at all. A very good discussion of the relative rights of a street railway company and abutting property owners in the use of a narrow street will be found in the case of *Birmingham Railway, etc., Co. v. Smyer*, 181 Ala. 121, 61 So. 358, 47 L. R. A. (N. S.) 597.

The third question, however, must be answered in the affirmative. Prior to 1890 our Constitutions contained no provision that "private property shall not be . . .
110 Miss.—13.

damaged for public use, except on due compensation being first made to the owner or owners thereof," so that, under the rule "that the general good must prevail over partial individual inconvenience" (*White v. Yazoo City*, 27 Miss. 357), the owner of private property was without remedy for any damage inflicted upon it for the public good. This rule was reversed by section 17 of the Constitution of 1890, as was pointed out in *King v. Railway Co.*, 88 Miss. 456, 42 So. 204, 6 L. R. A. (N. S.) 1036, 117 Am. St. Rep. 749; and the right of the individual to the enjoyment of his property is now superior to that of the public to damage it for the general good. Formerly the public might use or authorize the use of its property in any manner consistent with the general good, without liability for any consequential damages resulting therefrom to the property of individuals; but now, while it may continue to use its property in any manner consistent with the general good, it must compensate the owner of private property for any damage thereby inflicted upon it. A municipality still has the right to permit the use of its streets by a street railway, but only upon payment to abutting property owners of any damage thereby inflicted upon them.

These views are supported by *King v. Railway Co.*, 88 Miss. 456, 42 So. 204, 6 L. R. A. (N. S.) 1036, 117 Am. St. Rep. 749, and by the original opinion in *Slaughter v. Railway Co.*, 95 Miss. 251, 48 So. 6, 1040, 25 L. R. A. (N. S.) 1265. It is true that the decision in this last case did not in the end turn upon the point here involved, but the carefully prepared and well thought out opinion of MAYES, J., dealing therewith, is unanswerable in its logic.

Reversed and remanded.

IN RESPONSE TO SUGGESTION OF ERROR.

Counsel for appellees misunderstand what we intended to hold in our former opinion; this misunderstanding being properly caused by the incomplete statement, in the opinion, of the third question presented to us for determination. What we intended to hold was this:

Under section 17 of the Constitution a street railway company is without power to construct or to operate a street railway in the streets of a municipality until compensation has first been made to the abutting property owners for any actual damage which will result to them therefrom, and an injunction will lie to prevent it from so doing.

Overruled.

STEVENSON, J., took no part in the decision of this suggestion of error.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
OCTOBER TERM, 1915.

NATIONAL LIFE & ACCIDENT INS. CO. v. DeVANCE,

[70 South. 83.]

1. *TRIAL. Peremptory instruction. Right to. Libel and slander. Actions. Evidence.*

Where the evidence is conflicting a peremptory instruction should not be given.

2. *TRIAL. Instruction. Error.*

Where in an action for slander, plaintiff's declaration contained two counts and in the first count it was charged that the slanderous words were spoken by defendant's soliciting agent and in the second count the slanderous words are charged to have been spoken by defendant's superintendent, and the first count not being supported by the evidence, the court instructed the jury to find for the defendant on that count, it was error for the court to then instruct the jury that if they believed from the evidence that both said agents or either of them while acting within the scope of their authority and while about their master's business, spoke of and to the plaintiff the slanderous words alleged in the declaration, then they should find for the plaintiff and assess his damages etc.

3. *LIBEL AND SLANDER. Actions. Evidence.*

In an action against an insurance company for slander uttered by its agents after the beneficiary in one of its policies had recovered judgment on the policy, evidence that recovery had been contested on the ground that the policy was obtained by fraudulent representations, was admissible in mitigation of damages.

APPEAL from the circuit court of Warren county.

HON. H. C. MOUNGER, Judge.

Suit by Henry De Vance against the National Life & Accident Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

N. Vick Robbins & Wells and May & Sanders, for appellant.

The court will observe that the second count of the declaration proceeds solely upon the right to recover damages on account of the alleged slanderous and defamatory words used toward plaintiff by G. E. Liles as agent of defendant. At the close of the testimony, the court granted defendant's instruction No. 1 to find for the defendant on the first count of the declaration.

This action of the court was manifestly intended to and should have eliminated from the consideration of the jury, all of the evidence and all right of plaintiff to recover damages on account of the alleged slanderous words used by E. P. Mullen as set out in the declaration.

The court also granted defendant's instruction No. 6 (Record page 25) to the effect that the jury could not and should not base any verdict upon the words alleged to have been spoken by E. P. Mullen at plaintiff's house.

These two instructions given in behalf of the defendant excluded any and all right of recovery on account of any words which may have been spoken of the plaintiff by E. P. Mullen, at any time.

In the second count of the declaration, there is no claim whatever on account of any words used at any time by E. P. Mullen, and the court having instructed the jury to find for the defendant on the first count in the declaration, there remained nothing upon which the jury could lawfully render a verdict, except the alleged slanderous words used by G. E. Liles as set forth in the second count of the declaration.

And yet the court below, after having instructed the jury to find for the defendant in the first count of the de-

claration, and in total disregard of the fact that the second count of the declaration upon which alone a verdict could then be rendered, contained no allegation of any kind complaining of any words spoken by E. P. Mullen, proceeded to instruct the jury in plaintiff's instruction No. 2, that if they believed from the evidence, "that the defendant by its agent, E. P. Mullen and G. E. Liles, or either of them," spoke the slanderous words alleged in the declaration, they should find for plaintiff. This instruction (No. 2) for plaintiff, is in hopeless and irreconcilable conflict with defendant's instructions Nos. 1 and 6, and left the jury no intelligent rule to follow.

After the jury had been instructed to find for the defendant on the first count of the declaration, all defamatory words spoken by E. P. Mullen, were eliminated from the case and nothing remained of the declaration except the second count thereof, and in this count no complaint whatever is made on account of any words which may have been spoken by any other person than G. E. Liles.

When they were instructed in instruction No. 2 for plaintiff, that they were authorized to find a verdict for plaintiff on words which may have been spoken by E. P. Mullen, they were necessarily referred back to the first count in the declaration, since nowhere else in the declaration does E. P. Mullen's name appear; and so it is that they were first instructed to find for the defendant on the first count in the declaration, and also instructed that they might find for the plaintiff on account of the slanderous words complained of in that same count, and complained of nowhere else in the declaration.

Not only so, but in this same instruction for plaintiff (No. 2), the jury are not confined as they necessarily should have been, to the consideration of the slanderous words set forth in the second count of the declaration, but they are invited to the consideration of all slanderous words "alleged in the declaration," and this embraced the entire declaration, including both the first and second counts.

This instruction was not only in hopeless conflict with defendant's instructions, but it was confusing and misleading to the jury, and deprived the defendant of all benefit which it had a right to expect at the hands of the jury by the giving of defendant's instructions Nos. 1 and 6.

Under these two instructions for the defendant, even though the jury may have believed every word of the testimony of plaintiff's witnesses as to words spoken by E. P. Mullen as set forth in the declaration, still it was their duty to render a verdict for the defendant as to these words because they are only complained of in the first count of the declaration. The authority given to the jury to find for the plaintiff on any slanderous words used by E. P. Mullen or G. E. Liles, or either of them, as was given by plaintiff's instruction No. 2, was misleading in the highest degree because no words used by E. P. Mullen are alleged in the second count of the declaration and on this second count alone were they in any event authorized to find for the plaintiff.

Section 743 of the Mississippi Code of 1906, provides as follows: "In actions for libel or slander, assault and battery and false imprisonment, a defendant under the plea of not guilty, may give any evidence of mitigating circumstances to reduce the damages, notwithstanding he may also have pleaded a justification."

The plaintiff in this suit on the trial in the circuit court below, had been permitted to testify to the fact as to the pendency of this suit at law and as to the fact that he had obtained the insurance policy on the life of his son, and as to the fact that the defendant insurance company had refused to pay the policy after his son's death, all having been done over the objection of the defendant herein, and the declaration, in the second count, charges that the slanderous words alleged to have been spoken of the plaintiff, were uttered immediately after the trial of this cause in the court of the justice of the peace, and just a few minutes after the trial. In mitigation of the

damages it was clearly competent for the defendant to prove the character of the suit between the parties and the plaintiff before the magistrate's court, as also the result of said suit, as well as the attendant facts and circumstances. It was proper that these facts should go to the jury in order that they might know the precise facts and circumstances under which the slanderous words complained of were used and to know the extent of the provocation, if any, under which they were uttered, because the proof in this case shows that these words arose from a misunderstanding on account of testimony which had been given in that trial. The ruling of the court in excluding this testimony from the jury and in refusing to permit the defendant to cross-examine the plaintiff in regard to the facts and attendant circumstances of that trial, was clearly in opposition to the statute above referred to which provides that the defendant under the general issue, may give any evidence in mitigating circumstances to reduce the damages, not withstanding he may also have pleaded justification.

It was most important to the defendant, that the proof along this line should have gone to the jury in mitigation. It was proposed to show that the plaintiff had acted in bad faith towards the defendant with reference to the procuring of the insurance policy on the life of his son and that said policy was procured by false and fraudulent representations and these facts, which proven, would properly have been considered by the jury in mitigation of damages; they would have gone very far to show the worthlessness of plaintiff's character and to show that he had been but little damnified by the utterance of the language charged in the declaration as being slanderous. The proof was competent and should have gone to the jury and the error of the court below in refusing to allow the defendant in that court to make this proof, was fatal error and necessarily was prejudicial to the defendant in the highest degree. *Lewis v. Black*, 5 Cushman (Miss.) 434; Second Greenleaf Evi-

dence, paragraph 421; *Powers v. Pressgroves*, 38 Miss. 227.

A. A. Chaney, for appellee.

The first count of the declaration charges that one E. P. Mullen went to the home of appellee and attempted by threats to prevent him from proceeding with justice court suit against his company; that the justice matter was later tried and Mullen, after that time, met DeVance again, and used the language attributed to him, to the appellee, in the presence of witnesses, on the streets of Vicksburg, and the second count charging that G. E. Liles, superintendent of the company, used the language attributed to him immediately after the trial of the justice court suit.

Was Mullen acting within the scope of his authority and in and about his master's business when he went to the home of appellee, and when he used the words attributed to him by the witnesses in speaking of and to the appellee on the streets of Vicksburg? This is one of the questions raised by appellant in its rejoinder brief. It was the duty of agent Mullen to write insurance and collect premiums, according to his testimony. It is the duty of the superintendent, so he states, to make settlement of claims that come into the office. When Mullen went to the home of appellee he was accompanied by the superintendent, G. E. Liles. Hear the testimony of Mariah DeVance: "Who was with him (Mullen)?" "That gentleman there." "Mr. Liles?" "Yes, sir." and then (bottom of page 56: "Did Mr. Mullen have anything to say that night?" "Mr. Mullen did the raring." "Did Mr. Liles have anything to say?" "He said, 'you will get some nice clothes out of this suit'—both came in together," meaning Mr. Mullen and Mr. Liles. The testimony of appellee is that two or three came out to his house in the nighttime in response to the justice court suit, and when he heard the cursing he went into a back

room, and Mariah DeVance, the wife of appellee, identified G. E. Liles, the superintendent, as being one who came out to the house with Mullen, and was there with him at the time he is alleged to have done the cursing and made the threats as to what would be done if he, appellee, proceeded with the justice court suit against his company. We contend that even if Liles had not gone out to the home of appellee with Mullen, that Mullen, was clearly acting within the scope of his authority,—that he went there for no other purpose except to prevent, by threats and abuse, the appellee from proceeding with the case in the justice court, but certainly, it cannot be successfully contended that when he went there accompanied by his superior officer, the superintendent of the company, whose duty it was to make adjustment of claims, and who, at least, acquiesced in the actions of Mullen, he was not acting within the scope of his authority. The court will observe that the very first time that DeVance, the appellee, was attacked by agent Mullen, it was at his home, in the nighttime, that it related to the suit against his company, and that his superintendent was with him at the time, and that he acquiesced and took part in the abuse and vilification. “The other man said this—“You think you will get some money off the company to buy some fine clothes,” (meaning the other man who came out with Mullen). A few days after this occurrence at the home of appellee, Mullen met DeVance on the streets, near his home, and continued the same course started by him with his superintendent.

Was G. E. Liles acting within the scope of his authority when he used the language attributed to him by the witnesses at the home of appellee and at the justice court? This is another question raised in the rejoinder brief of appellant. It has already been shown that it was a part of his duty to make settlement of claims against his company, and it has been shown that a claim had been filed by the appellee; that he brought suit on this claim in the justice court; that after the suit was

filed Liles went to his home with Mullen at the time the trouble started; that this trouble continued till after the suit was tried in the court of Justice of the Peace, Kearney; that immediately after the trial, and inside of the steps leading to the court-room he, Liles, accused him of bribing the court and swearing to falsehoods; that he went to the court representing the company.

Another question raised in the rejoinder brief of appellant on page 19 of its brief, is that the appellant should have been permitted to have gone into the merits of the justice court proceedings, because, as it is argued, the appellant was placed in the false attitude of not paying a just claim. The record will disclose the fact that neither side of this controversy developed its side of the case in the justice court, except to show that suit had been filed and tried in the justice court as alleged in the declaration, and to show that appellee was cursed and abused by the agents of appellant because he had filed the suit in the justice court, but it is not shown that we went into details of this justice suit. It is argued that the court erred in refusing to permit the appellee to answer this question: "DeVance they refused to pay you that money because they said you made representations that were not true?" It is clearly shown that the justice court trial was not gone into by the appellee, but we contend that, regardless of the merits of this justice court matter, appellee certainly had the right to a trial without being abused and vilified by the appellant. The court will observe from the testimony of appellee that the appellant attempts to show cause for the mistreatment of appellee, by showing that the policy was procured by false representations. Can the appellant defend its actions, in mitigation of damages or for any other reason, in going to the home of appellee and of the treatment at the justice court by showing the policy was procured by fraudulent representations, and at the same time deny going to the home and deny the trouble at the justice court?

We submit, without going into further details, that the judgment of the court below should not be disturbed.

SMITH, C. J., delivered the opinion of the court.

This is an action for slander in which judgment was rendered for the plaintiff. The declaration is in two counts, in the first of which certain slanderous words are alleged to have been spoken of the plaintiff by E. P. Mullen, one of appellant's soliciting agents; and in the second count certain slanderous words are alleged to have been spoken of plaintiff by G. E. Liles, the superintendent of appellant's business at Vicksburg. The first count of the declaration was not supported by the evidence, and the jury were instructed by the court to find for the defendant upon that count. Appellee sued appellant in the court of a justice of the peace to recover the amount of an insurance policy issued by appellant upon the life of his, appellee's son. Liles was present at and participated in the trial of this case, which resulted in a judgment for appellee. Immediately after the rendition of this judgment, and as Liles, appellee, and several other parties were in the act of leaving the courtroom, he, Liles, according to the evidence introduced in behalf of appellee, said in the presence and in the hearing of appellee and several other persons that "if he (meaning appellee) had not paid the justice of the peace to decide against us and lied in his testimony, he would never have obtained a judgment against us;" that the judgment rendered "was a damned outrageous perjured one." This was denied by Liles.

At appellee's request the court below instructed the jury "that if they believe from the evidence that the defendant, by its agents, E. P. Mullen and G. E. Liles, or either of them, while acting within the scope of their authority and while about their master's business, spoke of and to the plaintiff, the slanderous words alleged in the declaration, and testified to by the witnesses of the plain-

tiff, then they will find for the plaintiff and assess his damages," etc.

The peremptory instruction requested by appellant was properly refused (*Richberger v. Express Co.*, 73 Miss. 161, 18 So. 922, 31 L. R. A. 390, 55 Am. St. Rep. 522); but the jury should not have been instructed to find for appellee in event they believed from the evidence that slanderous words alleged in the declaration were spoken of him by E. P. Mullen, and the error in so doing was not cured by the instruction charging the jury to find for appellant on the first count of the declaration.

In the brief of counsel for appellant it is said that the court below excluded testimony offered in behalf of appellant tending to show that it declined to pay the insurance policy and defended the suit thereon, on the ground that it was obtained by fraudulent representations made to it by appellee. We do not think the record is in such shape as to present this ruling of the court for consideration, but in order that the whole matter may be disposed of on the next trial, we will say that the evidence should not have been excluded, it being admissible in mitigation of damages.

Reversed and remanded.

MOORE ET AL. v. LUKE.

[70 South. 84.]

QUIETING TITLE. Bill of complaint. Sufficiency.

Where in a bill of complaint to quiet title complainant deraigned title from the government through a chain of title to themselves and charged that defendant claimed title through a former suit for partition and sale which they claim was fraudulent and not by the then owners or their legal representatives, and that the sale thereunder conveyed no title, and that complainants were not parties to that suit, such a bill was not a bill of review, but states a good cause of action and a demurrer thereto should have been overruled.

APPEAL from the chancery court of Kemper county.
HON. J. F. MCCOOL, Chancellor.

Suit by Elizabeth Moore and others against J. M. Luke.
From an order sustaining a demurrer to the bill of complaint, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

Huddleston & Austin, for appellants.

STEVENS, J., delivered the opinion of the court.

Appellants as complainants in the court below exhibit their bill of complaint against appellee seeking confirmation of their title to forty acres of land in Kemper county, and asking that the claim of the defendant be canceled as a cloud on their title. A demurrer was interposed to the bill and sustained by the chancellor, and from this decree appellants appeal. While the bill in some respects is subject to criticism, we think it sufficiently states a case. Appellants deraigned title from the United States government to Willard C. Mills; from Willard C. Mills to William Reid, Sr.; from William Reid, and his wife, Mary Reid, to Elizabeth Reid and Emma Reid, two of the Complainants; by deed from Elizabeth and Emma Reid conveying an undivided one-half interest to J. F. N. Huddleston and H. L. Austin, the other complainants. The bill further alleges that complainants are not fully informed as to the nature of the claim of the defendant, but upon information charge that he claims title to the lands in question through a commissioner's deed executed in pursuance to a decree rendered in an *ex parte* proceeding filed by E. E. Reid, claiming to be the widow of one Willie Reid, deceased, and by M. E. and E. J. Reid, minors suing by their alleged next friend, E. E. Reid. It is averred in the bill that E. E. Reid was not the mother of any of the complainants, that she had no interest in the land, and that neither M. E. nor E. J. Reid had any right, title, or interest therein, and that the partition suit referred

to was filed without the knowledge or consent of either Elizabeth or Emma Reid, and, if anything, was a fraud upon their rights. The bill in short avers that the proceedings to partite or sell the lands in question, and through which defendant claims, was a proceeding by parties other than the complainants, and conveyed no title whatever. The demurrer submits that the bill is a "fishing" bill and indefinite in its averments; that it is without equity; and that the complainants are barred by the statute of limitations. We do not construe the bill as a bill of review, and do not understand appellants to concede that they were in any wise parties to the former suit. The case is very similar to that of *Foster v. Canning Co.*, 71 Miss. 624, 15 So. 931.

The decree of the court below is therefore reversed, the demurrer overruled, and appellee granted thirty days after receipt of mandate by the clerk of the court below in which to answer.

Reversed and remanded.

EX PARTE HILLMAN.

[70 South. 84.]

BASTARDS. Proceedings. Bond for support. Acts of court in vacation.

Section 283, Code 1906, confers upon the circuit judge in vacation the power to discharge persons confined in jail for failure to give bond for the support of bastards, and this section is the full limit of his powers in the premises. The judge cannot in vacation commit a defendant in bastardy proceedings to jail and for such commitment a writ of *habeas corpus* will lie.

APPEAL from the circuit court of Greene county.

HON. W. M. DENNY, JR., Chancellor.

J. P. Hillman sued out a writ of *habeas corpus*, which was denied and he appeals.

The facts are fully stated in the opinion of the court.

J. W. Backstrom, for appellant.

Counsel for Fannie E. Byrd is in error as to the requirements of section 280 of the Code of 1906, and I will quote this section in full: "280 (261) Security may be Required—The circuit court shall, in case the suit be by the county, and may, if the suit be begun by the mother, or child, require the defendant who has been found to be the father of the child to enter into bond, with sureties, to be approved by the court, or by such officer as the court may direct, in a penalty not greater than the amount of damages assessed by the jury, not to exceed one thousand dollars, payable to the state, and conditioned to pay the same, in manner and form, as required by the judgment entered in the case, for the support and education of the child, and that the child shall not become a public charge; and the defendant may be committed to jail and dealt with as convicts of misdemeanors until he shall comply with the order to give such bond."

This action of bastardy was begun by the mother of the child and not by the county, and whether or not security should be required was in the discretion of the circuit court. The court however did require that security be given, but did not provide any penalty for a failure to give the security. The court did not require that the defendant be committed to jail for a failure to give the security, and this judgment being a final judgment, when that term of court adjourned, it must stand or fall within itself, there being no proceeding to correct or reform it, if such could be done. I will call your honor's attention to the last clause of section 280 referred to above, that "and the defendant may be committed to jail and dealt

with as convicts of misdemeanors until he shall comply with the order to give such bond." This matter or the matter of committing to jail is left to the discretion of the court, the court could require that security be given and then not commit to jail on a failure to furnish. When the judgment shown on page 7 of the record was rendered, the court did not require the defendant to be committed to jail for a failure to give the bond, and when the court failed to exercise that power then, it certainly could not do it in vacation without notice to the defendant, and I seriously doubt if it could be done under the circumstances.

Counsel for appellee attempts to show that appellant was in contempt of court for a failure to give the bond or pay the judgment, whether or not appellant might have been in contempt of court is no argument why he should be detained in this matter. Appellant is not detained for any contempt of court, and could not be legally detained until he was adjudged to be in contempt by a court of competent jurisdiction.

It is true that section 283 of the Code of 1906, does give the court the authority to discharge a person committed in a bastardy proceeding after six months, and the same can be done in vacation, but it does not give any authority in vacation to commit a person, and when a person is deprived of his liberty it must be legally done and the court must have the authority, and the only authority to commit in a bastardy case is given by the statute, and such statutes must be strictly construed.

I submit the chancellor erred in not discharging appellant and the judgment remanding appellant should be reversed and he be discharged.

E. W. Breland and Jas. R. McDowell, for appellee.

On appeal it is urged that the chancellor erred in not discharging appellant from custody, and in remanding him to the custody of the sheriff.

Section 280 of the Code of 1906, provides that the court may require the defendant who has been found to be the father of the child to enter into bond to pay the judgment for the support and education of the child "and the defendant may be committed to jail and dealt with as convicts of misdemeanor until he shall comply with the order to give such bond." Our court, following a long line of decisions, has upheld the statute. *Ex parte Bridgeforth*, 77 Miss. 418, 27 So. 622, 78 Am. St. Rep. 532.

Without doubt the court could have, in the judgment entered at the May term of the circuit court provided that if bond were not given promptly or within a reasonable time that defendant should stand committed to jail, and when he was committed to jail he could have been dealt with by the sheriff as a convict of a misdemeanor. The court however, did not remand him to jail until August 10th by an order issued in vacation without, so far as the record discloses, any summons or notice of any kind upon Hillman to appear and be heard; and it is argued that this order is void for that reason.

It is our contention that the court had a right at any time, when it was brought to his attention that his order had not been complied with, to order appellant to jail until he did comply with the order of the court. It is a matter of record that the defendant did not furnish the bond, and has not paid the judgment, and the second order which is merely supplementary to the first recites this fact. There is no defense which could have been offered. There was no necessity of summoning the defendant. The court, of his own motion, could have at any time, ordered the appellant to jail for failure to comply with the order requiring him to furnish bond.

It is our contention that the authority to remand the defendant to jail for failure to comply with the first judgment is a necessary incident to such order; and that as a matter of fact the sheriff could at any time within reason have taken appellant into custody for his failure

to comply with the order of the court, and certainly, when the court's attention was called to this failure. The power was inherent in the court to enforce its order by directing the immediate arrest of the defendant who had refused to comply therewith. "I quote from the following, a Massachusetts case:

"It is not easy to see why a court cannot issue process to compel a compliance with an order which it can lawfully pass in the absence of the party, or why a party could not as well be arrested wherever he may be found under such an order as he could upon an execution in common form. The statute provision is that he may be committed, and an order to that effect may be passed upon his default, that is in his absence." *Young v. Makepeace*, 103 Mass. 50, 57.

"No other writ than an order of the court is necessary to authorize defendant's imprisonment upon his failure to give security for support." *State v. Mullen*, 50 Indiana 598.

One who disobeys or disregards or fails to comply with an order of a court of competent jurisdiction is in contempt of court and may be punished therefor.

"Power to punish for contempts is essential to the preservation of order and the proper discharge of judicial functions, and is inherent in all courts, especially those of superior cognizance." *Shattuck v. State*, 51 Miss. 50, 24 Am. Rep. 624.

"The probate court has power to imprison an administrator, executor, or guardian, for contempt, on account of his failure or refusal to comply with any lawful order of the court." *Watson v. Williams*, 36 Miss. 331; *Verner v. Martin*, 10 S. & M. 103.

I cite these cases to show the authority of the court to enforce its own orders. If the court is stripped of such authority, then proper and orderly administration of proceedings in court would resolve itself into a farce.

Cook, J., delivered the opinion of the court.

Appellant was, by order of the circuit judge in vacation, committed to the county jail for his default in making a bond which the circuit court had theretofore ordered him to make as a part of its judgment in bastardy proceedings instituted against him by the mother of his bastard child. Appellant sued out a writ of *habeas corpus* returnable to the chancellor, and upon the hearing the chancellor declined to grant relief, but remanded appellant to the custody of the sheriff to await the order of the circuit court.

It will be noted that the relator was deprived of his liberty upon the order of a circuit judge made in vacation, because the relator had failed to comply with the judgment of the circuit court requiring relator, as defendant in bastardy proceedings, to make a bond conditioned to pay the plaintiff the judgment rendered against defendant in said bastardy proceedings. The vacation judgment of the circuit judge was a nullity. We can find nothing in the statutes authorizing the circuit judge in vacation to render the judgment in question, and he has no such authority without statute. Section 283, Code 1906, confers upon the judge in vacation the power to discharge persons confined in jail for failure to give bond for the support of bastards, and this section is the full limit of his powers in the premises.

The relator was illegally deprived of his liberty, and the chancellor should have ordered him discharged.

Judgment will be entered here reversing the chancellor and discharging appellant.

Reversed.

RUBENSTEIN v. GROSSMAN-WINFIELD MILLINERY Co.

[70 South. 210-69 South. 688.]

SALES. Quantity delivered. Right of buyer.

Where a purchaser bought a job lot represented to contain not more than four dozen hats of different styles and values, and on being received, it was found that there was a greater number than represented and there was no way to identify and separate the goods bought from the the goods not bought. In such case it was incumbent on the purchaser to reject the entire shipment or to receive all and pay for same.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

On suggestion of error. For former opinion see 69 So. 688.

The facts are stated in the opinion of the court.

R. S. Hall, for appellant.

T. C. Hannah and *John Haney*, for appellee.

Cook, J., delivered the opinion of the court.

We do not think there is any conflict in the decision heretofore rendered in this case with the holding of this court in *Hutchins v. Smith-Harrison Company*, 64 So. 789. In the *Hutchins Case*, *supra*, the appellant bought a certain kind of goods, which were actually shipped, but the seller shipped other goods, which were not bought. The purchaser retained the goods bought, and returned the goods not bought. In the present case the purchaser bought a "job lot," represented to contain not more than four dozen hats of different styles and values. The seller misrepresented the number of the hats in the "job lot," and there was no way to identify and separate the goods bought from the goods not bought, and when the

purchaser discovered this fact it was incumbent upon him either to reject the entire shipment, or to receive all and pay for same.

It is not claimed in the present case that appellant actually purchased the identical hats retained by him, and that he returned the hats not purchased. He merely selected from the lot three or four dozen hats and returned the balance. The distinction between the Hutchins Case and the present case was clearly pointed out in the original opinion; but, since appellant still insists that there is a conflict in the decisions, we deem it advisable to emphasize the patent difference in the facts of the two cases.

Suggestion of error is overruled.

FIRST NATIONAL BANK OF NASHVILLE v. DEAN ET AL.

[70 South. 245.]

BILLS AND NOTES. Assignment. Notice.

Where the maker gave his note to a bank of which he was a director and the bank assigned the note to a third party and the director when making a payment upon the note to the cashier was told that it was not in the bank, he could not claim that he made the payment to his bank without notice of the assignment, since being put upon inquiry and able to ascertain the true facts he was chargeable with notice that his note had been assigned.

APPEAL from the chancery court of Bolivar county.
HON. M. E. DENTON, Chancellor.

Suit by First National Bank of Nashville against L. G. Dean and another. From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

J. B. Harris, for appellant.

Any reasonable man must know that Mr. Dean a director in this Bank, knew from Mr. Meadow or from some other source, why his note for this large sum was out of the custody of his own Bank. Mr. Dean's defense is that he made the payment without notice of the assignment, and the burden of proof was on him to show this, and while he says that he did not know where the note was at the time he made the payment, he nowhere testifies that he did not know (and it is but natural that an officer of the Bank would know) that the note had been assigned.

If the court should hold that it is bound by the chancellor's finding that Mr. Dean was not told that the note had been hypothecated, by the Bank, and that he had not actual knowledge of any assignment of his note, the chancellor nevertheless was in error as to the law, in not holding that Mr. Dean had constructive notice under his own testimony and the conceded facts in the case. Mr. Dean himself testified that at the time he paid by checks the four thousand, four hundred eighty-six dollars and fifty-seven cents, that Mr. Meadow told him that the note was not in the Bank, but that he would get it in a few days. Certainly, as an officer of the Bank, he knew the note belonged in the Bank, unless it had been assigned to some other party. In fact, everybody knows that under ordinary conditions, banks hold custody of their own securities.

When asked upon cross examination if he did not understand from what Mr. Meadow said that the note had been hypothecated he said "I can't say that it was, he told me the note was not in the Bank." And in reply to the question, "When he made that remark, you naturally understood that the note had been hypothecated?" he said: "Well, I can't say that did," and when further pressed by the question, "You say that you did not take that view of it?" he testified, "I don't remember now—as I said awhile ago, that if the note was out of the Bank,

it was in somebody else's hands." But nowhere does he say that he thought that the Bank held the title to the note. Under the circumstances of the case, and in view of Mr. Dean's official position in the Bank, certainly he had enough information to put him on inquiry, and especially so when he had but to look, or ask, to inform himself.

As to the character of notice, the principle seems to be pretty well established by authority that whatever is enough to excite attention or put the party on inquiry is notice of everything to which the inquiry might lead, sufficient information to lead to a fact, shall be deemed sufficient to charge a party with knowledge of it. *Parker v. Foy*, 43 Miss. 260.

From the moment that he had such information, as would put a man of ordinary prudence and care on investigation—information not derived from vague and loose rumor, but from persons connected with the transaction—he is chargeable with knowledge of the truth to which he could have attained. *Parker v. Foy, supra*.

A slight investigation would have conducted him to a knowledge of the true state of the title; consequently, he must be charged with knowledge thereof, for whatever is enough to excite attention or put a party on inquiry, is notice of everything to which such attention or inquiry might reasonably be led. *Baldwin v. Anderson*, 103 Miss. 462.

We therefore, respectfully submit that there should have been a decree against Mr. Dean for the face of the note with ten per cent. interest to date and ten per cent. attorney's fee as provided for in the note, and we ask that this decree be rendered here.

D. J. Allen, Jr., for appellees.

The only notice imputed to Mr. Dean, then was that his note was not in the bank (The First State Bank of Shaw), when he made the payment at and to that bank. There was no notice that the note had been assigned or hypothe-

cated. And, as long ago as 1844, in the case of *Allein v. Agricultural Bank*, 3 Sm. & M. 48, it was held that the mere non-production of a note at the time of its payment is not, in itself, notice that the note has been assigned, or sufficient to put the maker upon inquiry. In the case cited, the supreme court said (page 57):

“The appellants rely upon the statute regulating the assignment of promissory notes, etc. (How. & Hutch. S. 12), as affording them the benefit in this action of the liquidation of the note by the maker, with Fauver & Farnsworth. This payment was complete, although the note was not surrendered up at that time. A demand of payment, without a presentation of the note, is an insufficient demand; but payment of a note, without its delivery, but also in the absence of notice to the maker of its assignment is good and is protected by the very operation of this statute. It does not appear that the note had been assigned at the time of the arrangements with Fauver & Farnsworth. The fact of its non-delivery at that time might possibly raise such a presumption; but, in a defense of the kind under consideration, the proof of notice to the maker of the assignment, is a matter requiring a higher degree of evidence than that of presumption.”

The presumption in the case cited was stronger than the presumption which would arise in the case now before the court from the mere non-production of the note, because in the cited case the makers had paid the note in full and had required an indemnifying bond at the hands of the payee, to guarantee the future delivery of the note and to protect them against loss should the note afterwards be put in action by a third party. In the instant case, the maker had no right to expect the note to be delivered to him, as he was not making payment in full, so that there could be no reasonable presumption to arise from its non-delivery to him at the time.

In the case of *Shields v. Taylor & Tarpley*, 25 Miss. 13, the notice of the assignment of a bill of exchange was much stronger than the notice proven in the case at bar.

Counsel for appellant, in his brief, seems to lay some stress upon the fact that Mr. L. G. Dean was a director in the First State Bank of Shaw. This fact would but furnish Mr. Meadow with additional reason to conceal from Mr. Dean the fact that his note had been hypothecated, when Mr. Meadow meant to retain in his own possession the large sum of money which Mr. Dean was paying in on his five thousand dollar note. Had Mr. Dean, as a director of the First State Bank, been in fact informed that his five thousand dollar note had been assigned, he would either have insisted upon paying the note to the holder or would have been careful to see that the payment was remitted to the holder of his note. There is not shown any record to have been kept of the papers which were deposited with the First National Bank as collateral securities, and from no books or records kept by the bank, does it appear that Mr. Dean could have possessed himself of information as to the hypothecation of either of his notes. Knowledge gained by Mr. Dean that his five thousand dollar note had been hypothecated and yet that the payment made by him on his note was retained in the possession of the First State Bank would certainly have led to an investigation, resulting in a disclosure of the true condition of the bank. Meadow was determined to postpone the evil day of final failure just as long as could be done by devious methods, and this fixed determination on his part was sufficient to lead him to conceal from the directors, stockholders and depositors the true *status* of affairs. Aside from these considerations, a complete answer to the theory that Mr. Dean, as a director of the First State Bank, may be charged with constructive notice of the hypothecation of his note, may be found in the fact that the bill of complaint does not proceed, and the case was not tried before the chancellor, upon any such theory. The bill of complaint does not even allege that Mr. Dean was a director of the First State Bank of Shaw; it does not intimate that, because of his directorship in that institution, he may be held to be chargeable with constructive

notice of the assignment or hypothecation of his note; the relief sought is not asked because of Mr. Dean's connection with the bank or his constructive knowledge of the details of its business affairs. But, on the other hand, the bill expressly charges that Mr. Dean had actual notice from J. K. Meadow, the cashier of the First State Bank, that his note had been assigned at the time he made the payment thereon. And it was upon the question of actual notice *vel non* on the part of Mr. Dean that the case was submitted to the chancellor; the idea that Mr. Dean could be held chargeable with constructive notice of the hypothecation of his note simply because of his directorship in the bank, was not broached in the argument of the case before the chancellor, and we submit that the case having been tried and decided upon one theory in the lower court cannot here be tried upon a totally different theory. This court, in reviewing this case upon appeal, will hold the complainant, appellant here, to its theory of the case as presented by its bill of complaint and upon which the case was tried and argued before the chancellor, and will not permit appellant to advance a totally different theory here from that upon which the case proceeded in the lower court. *I. C. R. R. Co. v. Handy*, 66 So. 783; *Railroad Company v. Schraag*, 84 Miss. 154; *Railroad Company v. Sumrall*, 96 Miss. 867.

STEVENS, J., delivered the opinion of the court.

This is a suit in equity by appellant as complainant in the court below, pledgee of a certain promissory note executed by appellee, L. G. Dean, in favor of the First State Bank of Shaw, of which W. G. Hardee, appellee, was appointed receiver. In May, 1911, Mr. Dean executed and delivered to the First State Bank of Shaw his two promissory notes, one for five thousand dollars and the other for four thousand dollars, both payable on demand to the order of the First State Bank of Shaw, both bearing interest from date and providing for at-

torney's fees. In August, 1911, the First State Bank of Shaw negotiated a loan from the First National Bank of Nashville, Tenn., appellant herein, for ten thousand dollars, and to secure the payment thereof, hypothecated with appellant certain notes as collateral security, among them the five thousand dollar demand note executed by Mr. Dean as aforesaid. This ten thousand dollar note held by appellant was afterwards reduced to seven thousand, five hundred dollars and renewed December 1, 1911, in the sum of seven thousand, five hundred dollars, payable on demand and secured by proper assignment, by the five thousand dollar demand note of Mr. Dean, along with other collateral. The four thousand dollar demand note of Mr. Dean's was hypothecated by the First State Bank of Shaw to secure a loan obtained from the Bank of Leland; and, after the appointment of Mr. Hardee as receiver, this four thousand dollar note was redeemed and held by the receiver as an asset of the Bank of Shaw at the time this suit was instituted in the court below. In October, 1911, and after both notes of Mr. Dean had been assigned by the First State Bank of Shaw as stated, Dean, as maker of the notes, went to the banking establishment of the First State Bank of Shaw and paid the cashier four thousand, four hundred and eighty-six dollars and fifty-seven cents, with the request that the payment be applied to his notes, and not to an overdraft the bank then held against him. On cross-examination, Mr. Dean himself says:

"I had an open overdraft, and I did not want this to go on the cotton overdraft, and I asked him to apply it on the notes—one or the other of the notes. I did not say which one of the notes, because it was natural to suppose that the four thousand, four hundred would apply on the larger note; and I noticed on the margin of the notebook that he applied it on the larger note."

When Mr. Dean tendered his payment, the cashier informed him that his notes were not in the bank; and,

waiving certain conflicts between the testimony of the cashier and Mr. Dean, it appears undisputed that Mr. Dean thereupon insisted upon the payment being applied to his notes, and that in his presence the cashier took the bills receivable or note register and noted this payment in writing opposite the place where the five thousand dollar note appeared of record. Mr. Dean was, at that time, a director of the First State Bank of Shaw, but denied actual knowledge or notice of the assignment of his five thousand dollar note to appellant. His testimony in reference to notice of the assignment is, to some extent, indefinite and unsatisfactory. When asked if the cashier told him his note had been hypothecated, he says:

"No sir; never at any time did he tell me. I did not ask him."

And being asked if that was not his understanding, he says:

"I can't say that it was. He said the note was not in the bank. . . . I could not say just what view I did take of it, as I said awhile ago that if the note was out of the bank, it was in somebody else's hands."

Subsequent to this transaction, the receiver was appointed for the First State Bank of Shaw, then insolvent; and the receiver qualified and was administering, under the supervision of the chancery court, the estate of said bank. It appears that appellant did not propound its claim as a secured creditor in the insolvency proceedings, but proceeded to the collection of its collaterals, and to that end exhibited its bill in chancery to recover upon the five thousand dollar note in question.

The receiver and Mr. Dean both contend that the money paid by Mr. Dean to the cashier constituted a valid payment on the note here sued on. Appellant contends that the First State Bank of Shaw had no authority to receive and apply this payment, and that Mr. Dean had both actual and constructive notice of this. Mr. Dean in his answer, as well as briefs of his solicitors,

offers to pay the balance due on the five thousand dollar note in question as well as the four thousand dollar note. It is the further contention of appellant that the further payments due by Mr. Dean should be applied first to the liquidation of the entire principal, interest, and attorney's fees claimed by appellant on the five thousand dollar note, with the right on the part of Mr. Dean to insist upon the money paid to the cashier of the First State Bank of Shaw being applied to the four thousand dollar note. It is conceded by all parties that it is immaterial to the rights of Mr. Dean whether the payment in question is applied to the note of appellant or to the note now held by the receiver. The chancellor treated the payment as applying on the note here sued on, and limited appellant to recovery of the balance of the principal and interest and the attorney's fees due only upon this balance. We think the evidence sufficiently shows that Mr. Dean had notice of the assignment of the note here sued on. He asked that his payment be applied to his notes, one or the other. He was told by the cashier that neither of his notes was in the bank at the time he made the payment; and by this information he admits that he knew the note here sued on was in some one else's hands. If the note was in the hands of parties other than the bank, he knew it had been either pledged or sold outright. One question propounded by him to the cashier would have disclosed appellant as pledgee. But, waiving any duty to inquire from the cashier, Mr. Dean was at that very moment standing in the midst of the bank's records—in arm's reach of the very records that are bound to have reflected the loan from and pledge to appellant. As a director of the institution, he had access to all of the records of the First State Bank of Shaw, and as one of its agents had the absolute right to demand from the cashier or other employees of his own bank just what disposition had been made of his notes. Instead of one word of inquiry, he deliberately closed his eyes to information at his immediate command, and

should not, and cannot, now be heard to say that he has made the payment in question, innocently and without notice of the assignment to appellant. Notice of assignment, to be availing and effectual, need not come direct from the assignee or holder of the paper. It is sufficient that the maker has notice from any source.

"Such notice usually comes from such source, but the law does not require it. If the maker has notice, in other words, if he knows that the note has been transferred, it is immaterial how, or from whom, he acquired such information, as thereafter he is precluded from acquiring as against the assignee, any set-off. This is expressly ruled in *Jones v. Witter*, 13 Mass. 304, and in *Small v. Browder*, 11 B. Mon. (Ky.) 212. In this last case, information that the note had been assigned was held sufficient, though the defendant was not informed that the note had been assigned to the plaintiff. In neither of these cases had notice been given by the assignees, and in both of them set-offs were excluded, because information that the notes sued upon had been assigned was imparted by others." *Johnson v. Amana Lodge, No. 82, Independent Order of Odd Fellows*, 92 Ind. 150.

The information imparted to Mr. Dean by the cashier, his position of cashier, the circumstances surrounding him, the fact that he was dealing, not with a private individual, but with a banking institution, and stood in the midst of the very information at his command, all conspire to charge him with notice of appellant's rights in the premises, and place him in an attitude of declining to know the very thing about which he says he was ignorant.

"Where, however, the circumstances show that the purchaser of paper refrained from making inquiry lest he should thereby become acquainted with the transaction out of which the note originated, he cannot occupy the attitude of a holder in good faith without notice." *Schmueckle v. Waters*, 125 Ind. 265, 25 N. E. 281.

"No man should be permitted to willfully close his eyes and then excuse himself upon the ground that he did not see." *State Nat. Bank of Springfield v. Bennett*, 8 Ind. App. 679, 36 N. E. 551.

This case is differentiated from that of *Allein v. Agricultural Bank*, 3 Smedes & M. 48, relied on by counsel for appellee. In the latter case an accommodation note, in form negotiable, was executed by Thos. Allein, in favor of Jas. Wood, and by Wood indorsed to James Payne and by Payne to Fauver & Farnsworth. It was dated April 9, 1836, due four years after its date. In January, 1838, long before its maturity and before assignment, complete satisfaction was made; and Fauver & Farnsworth, not having the note in their possession at the time, executed an indemnity bond conditioned to deliver up the note. The opinion states:

"It does not appear that the note had been assigned at the time of the arrangement with Fauver & Farnsworth."

The facts of that case further show that not one word was uttered by the holders of the note indicating claim of ownership by other parties; and there were no such circumstances as surround Mr. Dean in the instant case.

Appellant, in our judgment, is entitled to recover the full amount of principal, interest, and attorney's fees, on the five thousand dollar note sued on. The decree of the court below must therefore be reversed and set aside, and the cause remanded, for further proceedings in accordance with the views herein expressed, and without prejudice to the right of Mr. Dean to offset the payment of four thousand, four hundred and eighty-six dollars and fifty-seven cents, against the four thousand dollar note now held by the receiver.

Reversed and remanded.

SMITH, C. J. (dissenting). The burden of proving that when appellee Dean paid the First State Bank of

Shaw he had notice that his note had been negotiated was upon appellant (4 Cyc. 110); and this burden, under the ruling in the cases of *Allein v. Agricultural Bank*, 3 Smedes & M. 48, and *Shields v. Taylor*, 25 Miss. 13, was not met. I am of the opinion, therefore, that the decree of the court below should not be reversed upon the ground relied upon by my associates.

HEWLING ET AL. v. BLAKE ET AL.

[70 South. 247.]

1. **VENDOR AND PURCHASER.** *Innocent purchasers. Notice. Adverse possession. Lost deed. Acts of ownership. Presumption. Quietting title. Evidence. Claim against state. Void tax deed. Taxation.*

In a suit in equity to confirm title to land claimed by plaintiffs where the defendants claimed title to the land by adverse possession and plaintiffs claimed to be innocent purchasers for value without notice, the fact that such lands were indicated on an official county map as owned by defendants and the sectional index used by the county reflected all the conveyances affecting these lands and showed numerous deeds executed by defendant and his grantors from time to time and the fact that the property had been for a long time assessed to and the taxes paid by defendants, were sufficient to charge plaintiffs with notice of defendant's claim to the land.

2. **ADVERSE POSSESSION.** *Lost deed. Acts of ownership. Presumption.*

Where defendants claim title to land under a lost deed from the president of the board of police made under an order of the board that the president execute such deed pursuant to the provisions of the act of October 19, 1852 (Laws called Sess. 1852, chapter 68), authorizing the sale of county lands for levee purposes, which order recites that defendant's remote predecessors in title had bought and paid for the land, the long continued possession of such land by defendants and their predecessors accompanied by such acts of ownership as any reasonably prudent owner would exercise such as paying the taxes, cutting

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timber, leasing the land for pasturage and granting hunting and fishing privileges, raised a presumption of law that the original deed was executed and delivered.

3. ADVERSE POSSESSION. *Claim against the state. Void tax deed. Statutes.*

In an action to quiet title to land, where plaintiff claimed title to the land which the county held in trust for levee purposes as provided for by Act of October 19, 1852, under a deed from the county, while defendant claimed title thereto by adverse possession under color of title of a subsequent tax deed, defendant's adverse possession after the year 1890 could not ripen into title, since by section 104, Constitution 1890, the running of the ten-year statute of limitations against the state was stopped.

4. TAXATION. *Tax deed. Validity.*

A tax deed to land held by the county in trust for levee purposes as provided by the Act of October 19, 1852, was void, since such land while so held was not subject to sale for taxes.

APPEAL from the chancery court of Warren county.

HON. E. N. THOMAS, Chancellor.

Suit by S. A. Hewling and others against Henry L. Blake and others. From a judgment for defendants under a cross bill, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

T. G. Birchett and Hirsh, Dent & Landau, for appellants.

It has been the law of this state, back and prior to the time of the alleged purchase of the land from the county by Benson Blake, that "all sales of land and all other conveyances whatsoever of lands shall be void as to all creditors and subsequent purchasers for valuable consideration without notice unless they shall be acknowledged, or proved and lodged for record." Code of 1857, p. 310, article 21; Code of 1871, section 2304; Code of 1880, section 1212; Code of 1892, section 2457 Code of 1906, section 2784.

The sections cited, *supra*, have been the law since before the date of the alleged sale from Warren county to

Benson Blake, and to this day. The effect of these sections being that when one receives a deed to a parcel of land and fails to have it recorded, that a subsequent purchaser without knowledge of same acquires a valid title to same; and he who withholds his deed from record is defeated of his ownership, unless the other had actual notice thereof.

The decisions construing the above sections have almost uniformly involved the question, as to whether the purchaser claiming under the unrecorded deed would be saved by the purchaser under the subsequent deed having actual notice of such an unrecorded deed.

"While possession of land under an unrecorded deed is equivalent to registration while the possession under it lasts, but a purchaser of the land, where the record shows a good title, is not bound to look beyond the record of a former occupancy of it under a deed of which he is not shown to have had notice." *Hüller v. Jones*, 66 Miss. 636, Syllabus; *Newton v. Priebatch*, 16 Miss. 406; *Humphreys v. Merrill*, 52 Miss. 94; *Taylor v. Lowenstein*, 50 Miss. 281; *Henderson v. Downing*, 24 Miss. 106, and *Harper v. Tapley*, 35 Miss. 606.

It is the law in Mississippi that a purchaser of a legal title is not effected with record notice of any conveyance except those through whom he is compelled to deraign his title. *Baker v. Griffin*, 50 Miss. 158; *Harper v. Bibb*, 34 Miss. 472; *Session v. Reynolds*, 7 Smedes & Marshall, 153; *Hüller v. Jones*, 66 Miss. 642; *Hart v. Gardner*, 81 Miss. 650.

Having as we think established the law beyond dispute that the deed even if it existed, which was denied by the pleadings, not being of record, was not effective against the appellants, we will discuss the order of the board of supervisors, or rather its predecessor, the board of police. What could this operate as, and to what extent was it notice?

The county map is put in evidence by the appellees and it shows, now owned by the Blakes, appellees, the very

land shows in the order, *supra*, we will explain. The land involved in the instant suit is section 6, township 17, range 4, east, Choctaw district. The land in the order is section 6, township 17, range 4, east. The map shows two sections by the number 6, one in township 17, range 4, east, Choctaw district, and the other not in the district at all; in other words there were two sections 6, of the same township and range, one in the district and one ordinary Government Survey. The order does not show the county, by its board of police, even sold the one in Choctaw district to Mr. Benson Blake, but shows it sold the other, the plain section. The map shows that the plain section is owned by the Blakes and so does the evidence. What notice could be imputed to an order (even if this court should take the view, which we do not think is the law, that the order is to be so dignified and is to be considered as notice), when this order does not set forth the land purchased by the appellants, but other land adjoining said land purchased by them, which was owned by the Blakes. We think this undoubtedly eliminates the order from all consideration. It clearly is not anything upon which a claim of an unrecorded instrument could be based, as it does not even call for or describe the land involved in the instant suit. A deed, even of record, from the county to Benson Blake, omitting the Choctaw district, as the designation of the land, and describing it by the regular survey, would not put the appellants on record notice, because, describing under the order, land in the neighborhood held by the Blakes, it could not have suggested it meant land a mile or so off of another description. Any other construction would entirely destroy the whole theory of the registry statutes.

The land involved in the instant suit is wild land, uncultivated, unfenced, a howling wilderness, primeval forest, as appears from the evidence in this case; subjected to no actual occupation, no possession by the appellees, who may claim they paid the taxes on these

lands, not subject to assessment or taxation, permitted three independent cuttings, scattered over nearly thirty years. This court has held that payment of taxes was not evidence of possession (*Leavenworth v. Reeves*, 64 So. 663-5-6). Land owned by the county is not subject to assessment or to taxes, being exempt by the statutes of this state, since before 1858, therefore what can the illegal assessment and unlawful collection of taxes on land not subject to same have on any purchaser who finds the land owned by the county on the records of deeds, where the law obligates him to search. What notice can unlawful acts have, impute or give? Lands owned by the county were specially exempted from all assessment and taxation, as follows, towit: Code 1857, p. 73, Art. 11; Code 1871, sec. 1662, page 344; Code 1880, sec. 468; Code 1892, sec. 3744.

Hereafter, in our brief, we will discuss the law of adverse possession taken in connection with the evidence herein, which will show no occupancy, ownership or claim of any kind was even made to these lands until after suit was brought, recognized by the law.

In *Taylor v. Mosely*, 57 Miss. 547, the court says: Where in the record does the evidence show open, notorious, or exclusive possession of the lands by the appellees under a legal or equitable title? The evidence of Mr. T. R. Foster, record pages 55 to 58, introduced by the appellees, shows that since 1889 he has been, up to the time of their sale, in possession of said lands for Warren county, trying to sell same; had time and again showed purchasers over the lands, had them surveyed and had no knowledge the Blakes even thought they owned same until after the sale by the county. These lands, one of the appellees had only been over once, and that after the sale, and so far as the record shows the other appellee had never seen the lands. That he had, for the county, given the same permission to Capt. Fletcher, who must have doubted the appellees' claim, or he would not have gotten the consent of the agent of the

county for his fishing club. Foster is the witness of the appellees and his evidence shows the county claimed same since 1889. The record shows nothing but, on its face, an unlawful payment of taxes, on lands not subject thereto, and two timber cuttings years apart, and the evidence does not fix these cuttings with any certainty on these lands.

We will now take up the claim of the appellees to the southwest quarter of section 6, township 17, range 4, east, C. C., and we will undertake to clearly demonstrate that the appellees never had or acquired any title of any kind whatsoever to this land.

The appellees, in making their claim, do not undertake by even a shadowy deed, or a long lost and forgotten order of the board of police, which no one is charged by law to look up, or any other claim of transfer from Warren county, to acquire this land. They base their claim of title on a tax deed (rec. p. 23) from David Garrison, Tax Collector of Warren county, to the State of Mississippi, dated July 1, 1867, recorded in Deed Book "G. G.," p. 302, for the taxes of 1866, and a forfeited land patent from the state to B. J. Miller, dated October 13, 1869 (rec. p. 23) and a quitclaim deed from R. J. Miller to Mary S. Blake, dated January 25, 1873, recorded in Deed Book "P. P.," p. 200.

At the time of the sale to the state of Mississippi by the Tax Collector, *supra*, it is conceded and shown by the record in this case that the title and ownership of this land was in Warren county.

This tax sale is unquestionably void, because at the time of the sale the land owned by the county was not subject to assessment or sale for taxes. The Code of 1857 was operative at that time, and on page 73, article 11, the law distinctly says that land held by the county is not subject to taxation. It is hardly necessary to cite the recent decisions of this court on such a clear proposition. We will mention, in passing, *Edwards v. Butler*, 89 Miss. 179, and *Howell v. Miller*, 88 Miss. 655.

In this last case (88 Miss. 667) "The swamp and overflowed lands were never the subject of taxation and the sale for non-payment. Not being subject to any tax or any assessment, a sale of them had no warrant of law and the purchaser acquired no title against the state, or the state's vendee who bought with a warrant of law for this special sale."

These lands having been conveyed under the act of the legislature, hereinafter discussed, and the title being vested in the county for public uses pursuant to the terms of the donation, were not subject to taxation, or sale, for non-payment; and such sale could not be set up against the county's vendee, who bought with a warrant of law for their special sale.

The lands in controversy are swamp and overflowed lands, passing to the state of Mississippi under the Act of September 28, 1850.

From the above, we think it is clear that the Blakes got no title out of the county by virtue of this tax sale to the southwest quarter of said section, and that the legal title to these lands rested in the county at the time of the conveyance by the county to Phillip H. Field, through whom appellants claim.

J. B. Dabney, for appellee.

Counsel altogether ignores the sale by the State to Benson Blake of this whole section, as shown by the auditor's certificate. He urges that because the lands of the county were exempt from taxation under the statutes, no title could be passed to the southwest quarter by the sale of July 1, 1867, and he cites the laws of exemptions beginning with the Code of 1857. This sale, however, took place on May 17, 1854, and the title having passed to the county under the Act of 1852, if county lands were assessable between that date and May 17, 1854, Mr. Blake acquired a good title under this deed. The exemptions from taxation in Hutchinson's Code (1848) are as follows:

“Provided, that this act shall not be so construed as to authorize the assessing and collecting of any tax on the estate, real and personal, of any religious society, or the real or personal estate of any institution for the education of youth, or the maintenance of schools, or for charitable purposes, or any estate real or personal, belonging to any incorporated city or town, or a poll tax on any officer or soldier in the army or navy of the United States.” Hutch. Code, 171. It will be seen that they do not mention county property at all. There is no change in this law by the Acts of 1848, 1850, 1852 or 1854, and not until the Code of 1857 is county property mentioned in the list of exemptions. The case of *Howell v. Miller*, is not applicable for the reason that at the time of the tax sales in question the lands involved were owned by the state, not by a county, the title never having passed out of the state. The case of *Edwards v. Butler*, 89 Miss. 179, too, involves lands the title to which was in the state, and further, they were school lands, exempt by statute.

It is true that in the case of *Leavenworth v. Reeves*, 64 So. 660, cited by counsel, as well as in several other cases, it is held that a void tax deed will not support a title founded on three years' possession; however, we submit that in all of the cases so holding, the possession is for only a short period, designated in these special statutes, and in no case has it been held that a void tax deed is not color of title on which to base possession under the general ten year statute. On the other hand, it has been repeatedly held that no matter how defective the foundation of the claim, ten years' occupation gives title. For instance, a deed from a person who does not appear to have any title or authority. *Welborn v. Anderson*, 37 Miss. 162. A mere parol gift, *Davis v. Davis*, 68 Miss. 478. An unauthorized deed from a county, *Warren County v. Lamkin*, 46 So. 497, 93 Miss. 123.

In the instant case, no claim is made under these short statutes, but only under the ten years' statute of limitations, hence, even the void (which, however, we do not

concede), tax titles under which appellees claim the southwest quarter of this section are sufficient for the purpose in hand.

The Code of 1830 is silent as to the operation of these statutes against counties and we conclude that the common law was in force in this state on such matters. Our supreme court so decided, saying that such limitations against counties were operative at common law. *Clements v. Anderson*, 46 Miss. 597. In the case of *Brown v. Supervisors*, 54 Miss. 230, the court held that the bar of the statute operated to prevent the county recovering school land, when held under a void lease, and, so far as the term perfected the title of the lessees. This doctrine was reaffirmed in *Jones v. Madison County*, 72 Miss. 807, 18 So. 87. We therefore conclude that the board of supervisors cannot now maintain its suit for this parcel of land."

It will thus be seen that for a period of twenty-five years during which the statute of limitations ran against the county, this land was claimed by appellees, who were in possession of same and giving mortgages and paying taxes.

Now, as to the character of appellees' possession, this case is nearly on all-fours with that of *McCaughan v. Young*, 37 So. 839, 85 Miss. 297. From the opinion in that case we quote as follows: "The true doctrine, and the one now generally recognized, is thus stated by HARRIS, J., in *Ford v. Wilson*, 35 Miss. 490, 72 Am. Dec. 137: 'That neither actual occupation, cultivation or residence are necessary to constitute actual possession when the property is so situated as not to admit of any permanent useful improvement, and the continued claim of the party has been evidenced by public acts of ownership, such as he would exercise over property which he claimed in his own right, and would not exercise over property which he did not claim. *Worthley v. Burbanks*, 146 Ind. 534, 45 N. E. 779; *Hubbard v. Kiddo*, 87 Ill. 578; 3 Washburn on Real Property, sec. 1965.' it is not necessary

that the occupation should be such that a mere stranger passing the land should know that some one was asserting title to or dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it. The possession of land cannot be more than the exercise of exclusive dominion over it. 2 Wood on Limitations, sec. 267. In the instant case the record shows that the lands in controversy, from 1885 until 1900, when appellant entered into actual occupancy, were what are denominated 'wild lands,' lying in the midst of a vast area of swamp woodland, not susceptible to occupancy, improvement or cultivation, or of any remunerative or productive use. The test of what constitutes adverse possession of such property must of course be different from that which would be applied with reference to cultivated lands or property susceptible of actual use and occupation. The question is, did the person claiming to hold adversely exercise towards the property the same character of control which he used toward property actually his, and which he would not have used over property which did not belong to him? In this case Rozell had the land assessed to him, and he and those claiming under him, for a long term of years, paid all the taxes on the property without question from appellee or any one else. This of itself is a potential fact in proof of the hostile assertion of title by the party paying the taxes. *Ewing v. Burnet*, 36 U. S. (11 Pet.) 41, 9 L. E. 624, *Fletcher v. Fuller*, 120 U. S. 534, 552, 7 Sup. Ct. 667, 676, 30 L. Ed. 759, 764; *Holtzman v. Douglass*, 18 Sup. Ct. 65, 42 L. Ed. 466.

A possession which is adverse and actually known to the true owner is equivalent to a possession which is open and notorious and adverse. *Dausch v. Crana*, 109 Mo. 336, 19 S. W. 61; *Clark v. Gilbert*, 39 Conn. 94; *Alexander v. Polk*, 39 Miss. 737; *Ford v. Wilson*, *supra*. The doctrine is concisely stated in this form: 'If the owner have actual knowledge that the possession is adverse to his title, the occupancy need not be open, visible and

notorious. Notoriety is important only when the adverse character of the possession is to be brought home to the owner by a presumption. See 1 Cyc., p. 999, par. c. and cases cited."

There could hardly be more accurate statement of the facts in the case at bar than the above in the case of *McCaughan v. Young*, and hence the rules laid down there are equally applicable here. The Blakes, as shown by the evidence, exercised over this land exactly the same character of ownership and control as that exercised over the rest of their wild lands. They cut timber, paid taxes, gave mortgages, leased the land for pasturage and for hunting privileges. It was low and swampy—"a primeval forest, a howling wilderness," as counsel says in his brief.

Furthermore, each and every one connected with this title on the side of appellants had direct knowledge of the claim and of the acts of ownership exercised by the Blakes. Year after year beginning with 1858 for the north half and with the year 1873 for the southwest quarter, as shown by the evidence, the land was assessed to the Blakes and they paid the taxes. The assessment rolls and tax records went through the hands of the county officials and of the board of supervisors. A map was adopted by the county, through its board of supervisors, with the name "Mary S. Blake" written across this very land, indicating her ownership of same. The land was universally recognized throughout the neighborhood as being that of the Blakes.

We submit that counsel is in error when he states that any part of the case of *McCaughan v. Young*, has been overruled by that of *Leavenworth v. Reeves*, 64 So. 660.

It is held in the following cases that ten years' occupation, as declared in the statute, vests a "full and complete title," upon which the land can be recovered in ejectment without further evidence than the facts showing such possession. *Ellis v. Murray*, 28 Miss. 129;

Ford v. Wilson, 35 Miss. 490; *Davis v. Bowmar*, 55 Miss. 671.

“Title by adverse possession is as available for all purposes as a perfect record title.” *Scottish-Am. Mort. Co. v. Butler*, 54 So. 666.

In our humble judgment we have shown. 1. That under the authority conferred upon him by the board of supervisors, the president had no right to convey to Philip H. Feld the north half of the section; 2. That if the argument of opposing counsel is correct there is a break in appellants' chain of title as to all the land, in that the deed from Feld to Foster fails to place the land in the Choctaw District; 3. That the sale by the state to Benson Blake dated May 17, 1854, was a valid sale; 4. That if not, then this sale and that of July 1, 1867, furnished color of title upon which to base possession; 5. That appellees' possession was of such character as to meet the requirements of the law, the nature of the land being considered; 6. That the appellants and all their predecessors in title had knowledge, actual or constructive, of appellees' claim of ownership and possession.

And we therefore respectfully urge that the decree of the lower court should be sustained.

STEVENS, J., delivered the opinion of the court.

Appellants sued in equity to confirm title claimed by them to the lands described as the north half and southwest quarter of section 6, township 17, range 4 east, Choctaw district. The defendants made their answer a cross-bill, praying similar relief. The lands lie just north of the Yazoo river in Warren county; and both parties agree that the title passed from the United States to the state of Mississippi under the act of Congress approved September 28, 1850 (chapter 84, section 4, 9 Stat. 519), and were thereafter ceded by the state of Mississippi to the county of Warren by an act of the legisla-

ture approved October 19, 1852, "for the purpose of constructing, repairing and keeping up the levees in that county." Laws Called Sess. 1852, ch. 68. The board of police were authorized to sell these lands, the deeds to be executed by the president under the order of the board. Appellants and appellees both claim title to the north half of the section through conveyances from Warren county; appellants claiming through mesne conveyances based on the deed from the board of supervisors of Warren county to Philip H. Feld in December, 1902, and appellees claiming by descent from Benson Blake, who is alleged to have purchased the north half of the section in 1858. Appellants deraign a perfect chain of title. Appellees are unable to produce the deed from the board of police to Benson Blake and which they say has been lost or destroyed and cannot now be produced. In support of the existence of this missing deed, they rely upon an order on the minutes of the board of police dated April 17, 1858, reciting, among other proceedings:

"The following swamp lands in Warren county, Miss., have been sold and the purchase money paid to the levee commissioner and deeds are asked to be made to the purchaser, to wit: . . . Benson Blake, north half 6, township 17, range 4 east, three hundred and twenty acres at fifty cents, one hundred and sixty-two dollars. Ordered, that the president execute deeds to the foregoing parties respectively for said lands purchased by them."

Appellees claim title, not only through this lost or missing deed, but by adverse possession.

Appellants make the same deraignment of title to the south west quarter of the section as they do to the north half. Appellees, as to the south west quarter deraign title from the sale of this land to the state, for taxes, July 1, 1867; and by mesne conveyances to them of said tax title. They also claim title to this, as well as the north half of the section, by adverse possession. Sever-

al witnesses were introduced to establish adverse possession by appellees; and the chancellor found, as a matter of fact, that appellees held such possession of all the lands as their character would reasonably permit. He further held that the purchase of the north half of the section by Benson Blake, the payment of the purchase price, the order of the board directing the president to execute the deed, and the subsequent possession, confer a good and perfect title to the north half of the section. The chancellor further found that appellants were not innocent purchasers for value and without notice of the claim of appellees. The decree of the court below canceled the deeds under which appellants claim, and confirmed appellees' title.

There is ample evidence to justify the finding of the chancellor that appellants had notice of appellees' claim. It is shown that Warren county adopted an official county map, on the face of which claim of ownership by the Blake family is indicated. The sectional index used by the county reflects all the conveyances affecting these lands, and shows numerous deeds executed by the Blakes from time to time. The property has been assessed to, and taxes paid by, the Blakes all the while.

The chancellor was likewise correct in his holding that appellees owned the legal title to the north half of the section. The order of the board of police of April 17, 1858, shows that Benson Blake bought and paid for this portion of the land; and the president was directed to execute to him a deed in pursuance of this purchase. Benson Blake had the lands assessed to him, and paid taxes every year continuously until his death, and his heirs have continued to pay; and, since 1890, have cut and sold timber, leased the lands for pasturage purposes, granted hunting and fishing privileges, and otherwise used these swamp lands as any reasonably prudent owner would do under like circumstances. But for the Constitution of 1890 (section 104), providing that the statute of limitation here involved shall not run against the state

or any subdivision thereof, appellees would have had conferred upon them title by adverse possession; and the chancellor would have been justified in so finding. The case, however, as to the north half is controlled by the recent decision of this court in *Caruth v. Gillespie et al.*, 68 So. 927. The law, from the long-continued possession of the Blake family, such as is disclosed by this record, presumes the execution and delivery of the deed under which Benson Blake claims. This presumption is not only one of law, but is supported by the order of the board of police, which in itself is sufficient to characterize Benson Blake as the equitable owner. It cannot be said that appellees have no title simply because they are unable to produce a deed executed half a century ago. This salutary presumption of the law, under the circumstances of this case, protects appellees in the use and enjoyment of this old estate, and at least shifts the burden to appellants to show that the deed was not in fact executed.

As to the southwest quarter of the section, the case is different. The pronounced acts of possession, proved by appellees, occur subsequent to 1890. Prior to that time, the Blake family had prosecuted Dennis Burns for trespass on the lands; had given the land in for assessment, paid the taxes continuously, and executed deeds of trust covering the land. There is shown no clearing, cultivation, or improvements of any kind, prior to 1890. The owners, according to the positive evidence, cut no timber for commercial purposes or otherwise. There was no act of possession calculated to arouse the attention of the true owner. The Constitution of 1890 stopped the running of the ten-year statute of limitations. Appellees do not claim title to this portion of the land through any conveyance from the board of police of Warren county in accordance with the act of 1852. The only color of title is through the tax sale to the state in 1867, record of which is in existence. So far as the record of this case discloses, this portion of the land belonged to Warren

county, in trust, for the purpose mentioned by the act of 1852. It was such land as was not subject to sale for taxes. The tax sale relied on, therefore, is void and conveyed no title.

A careful examination of the record convinces us the chancellor erred in holding that appellees had title to the southwest quarter of this section, by adverse possession, under color of title furnished by this tax sale. Inasmuch as they have neither the paper title nor title by adverse possession, the decree of the court below as to this portion of the land will be reversed. The decree will be affirmed as to the north half of section 6, and reversed as to the southwest quarter, and decree rendered here in favor of appellants for the southwest quarter of the section.

Affirmed.

Reversed.

LOPOSSER v. STATE EX REL. GAUSE.

[70 South. 345.]

1. ELECTIONS. *Contests. Remedies.*

Under Code 1906, section 4186, providing that a person desiring to contest the election of another, returned as elected to an office within any county, may within twenty days file a petition in the office of the clerk of the circuit court of the county setting forth the ground upon which the election is contested and section 2439, providing that all the provisions of law on the subject of state and county elections shall govern municipal elections; a demurrer should be sustained to a *quo warranto* proceeding brought by a contesting candidate for the office of marshal of a town operating under the code municipal chapter, more than twenty days after the election and where the information

charged that the election commissioners erred in counting the votes and that he should have been inducted into office, since the procedure for contesting such an election provided by section 4186, Code 1906, is exclusive.

2. EVIDENCE. *Judicial notice.*

The court will take judicial notice that a given municipality was incorporated under the Code municipal chapter, and not under a special charter.

APPEAL from the circuit court of Harrison county.

HON. J. H. NEVILLE, Judge.

Quo warranto by state, on relation of S. T. Gause against A. W. Loposser. From a judgment of ouster, respondent appeals.

This suit was begun by information filed by the state of Mississippi, on the relation of S. T. Gause, being a *quo warranto* proceeding to inquire into the legality of the election of appellant, who had been declared elected as marshal of the town of Handsboro, as the result of an election in which appellant and Gause were opposing candidates for this office; it being alleged that the election commissioners of said town had made a return to the board of mayor and aldermen that the relator had received twenty-three votes and the appellant twenty-five votes. It is charged in the information that certain votes cast for the appellant were illegal, and that as a matter of fact the relator received a majority of the legal votes cast at said election. The prayer of the bill is that the appellant be ousted from the office of marshal and the relator declared elected to said office.

The appellant filed a demurrer, and set up the fact: That the town of Handsboro operates under chapter 99 of the Code of 1906, entitled "Municipalities," and that the effect of the proceeding in this case is in substance a contest between the relator and the appellant, and is governed exclusively by section 4186 of the Code of 1906, being in the chapter of said Code on the subject of "Registrations and Elections," and which said section provides that "a person desiring to contest the election of 110 Miss.—16.

another person returned as elected to an office within any county may within twenty days after the election file a petition in the office of the clerk of the circuit court of the county setting forth the ground upon which the election is contested," etc., and that under section 4187 such cases as are triable in vacation in the manner prescribed for proceedings in the nature of *quo warranto*, and that under section 3439 of the Code, it being a part of the chapter on "Municipalities," "all the provisions of law on the subject of state and county elections, so far as applicable, shall govern municipal elections." That said election was held on December 9, 1914, and this suit was not filed until some time in February, 1915, more than twenty days after said election, and after the time when contest could be filed under section 4186. The court overruled the demurrer, and the case went to trial, and the verdict of the jury was in favor of the relator, and judgment entered accordingly, from which this appeal is prosecuted.

J. L. Heiss and Money & Brown, for appellant.

Mize & Mize, for appellee.

SMITH, C. J., delivered the opinion of the court.

The ground upon which appellee seeks to oust appellant from the office to which he has been declared elected is, not that he is disqualified to hold the office or that the election was illegally held, but that the election commissioners erred in counting the votes cast at the election, so that the cause comes within section 4186 of the Code, which, under section 3439 of the Code, is applicable to code chapter municipalities. The town of Handsboro being a code chapter municipality, and the procedure for contesting an election provided by section 4186 being exclusive (*Ex parte Wimberly*, 57 Miss. 437), appellant's demurrer to the petition should have been sustained.

It is true that it does not appear from the petition that Handsboro is not governed by a special charter, but this fact is immaterial, for we judicially know that it was incorporated under the code chapter on municipalities by proclamation of the Governor on the 13th day of March, 1899, as appears from the records of the secretary of state. In two of the cases, *Kelly v. State ex rel. Kierskey*, 79 Miss. 168, 30 So. 49 and *Bourgeois v. Laizer*, 77 Miss. 146, 25 So. 153, called to our attention in this connection, municipal elections were contested by means of a proceeding in the nature of a *quo warranto*, but in neither of these cases was the question of jurisdiction raised, no doubt for the reason, as the fact is, that both the municipalities there involved were operating under special charters.

Reversed and dismissed.

CITY OF JACKSON v. BELEW.

[70 South. 346.]

1. PEACE BOND. *Statutes. Effect of appeal bond. Breach of the peace.*

The peace bond authorized by Code 1906, section 1561, is an additional penalty which the court may or may not impose upon persons who have been convicted of a criminal offense. The general sections of the Code preceding section 1561, relating to peace bonds have no application to the peace bond provided for under this section.

2. BREACH OF THE PEACE. *Bond. Effect of appeal bond.*

A peace bond given under section 1561, Code 1906, is superseded when the convict executes an appeal bond, since the peace bond is incidental to, and a part of, the penalty imposed by the court.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Habeas Corpus by John Belew. Relator discharged and the city of Jackson appeals.

This is an appeal by the city of Jackson from a judgment entered by the circuit judge, discharging the appellee from custody on a writ of *habeas corpus*. Appellee had been convicted in the justice of the peace court for selling intoxicating liquors, and a fine of one hundred dollars imposed. It being shown at the trial that he was an habitual violator of the liquor laws, the justice of the peace, acting under section 1561 of the Code of 1906, in addition to the fine imposed required appellee to enter into bond in the sum of one thousand dollars conditioned to keep the peace and be of good behavior and not sell intoxicating liquors for a period of two years. Appellee tendered an appeal bond in the sum of two hundred dollars, which was approved by the justice of the peace, thereby perfecting his appeal to the circuit court from the judgment imposing the fine of one hundred dollars, and also tendered another bond for the purpose of appealing from that part of the judgment requiring him to give the peace bond. The justice of the peace refused to approve the last bond for the reason, as set out by him, that "the condition to keep the peace pending appeal is not incorporated in said bond." The jailer having refused to release appellee from custody until he had executed the peace bond, a writ of *habeas corpus* was sued out before the circuit judge, who entered a judgment discharging the relator, from which the city appeals.

L. C. Hallam, for appellant.

The only point for consideration presented by this appeal is a construction of section 1561, Code of 1906. That section reads as follows: "The same" (Peace Bonds) "Convict of crime less than felony may be made to give

peace bonds.—Every court before which any person shall be convicted of an offense less than felony may, in addition to the penalty prescribed by law, require the convict to enter into bond in a reasonable sum, with or without sureties, to keep the peace and to be of good behavior for any time not longer than two years, and may order him to stand committed until such bond be executed; and for any breach thereof it may be proceeded on by *scire facias* as in other cases.”

It will be noted that sections 1548 to 1561, inclusive, relate to peace bonds. Section 1548 is headed “Peace Bonds;” and the heading of each of the following sections down to and including section 1561, is “the same;” that is, each section relates back and refers to the general subject “Peace Bonds.”

By section 1548 one may be required to execute a peace bond where the court adjudges that an offense is threatened only, though no offense has actually been committed. The measure is a preventive one, in the nature of a *quia timet*. From a requirement by a justice of the peace that one give this peace bond an appeal to the circuit court is provided for by section 1551. But, while an appeal is provided for, in order that the purpose for which the law was enacted and the bond required may not be defeated it is too plain for argument that, although an appeal from such requirement may have been prosecuted, yet, pending the appeal, and before the person required to give such peace bond can secure his liberty, the peace bond required must be executed. *Com. v. Ward*, 4 Mass. 497.

But one bond is required by section 1551, and that is a peace bond, and, in order for such peace bond to operate as an appeal bond also, there must be “the further condition in the bond that the appellant shall pay all cost in case it shall be adjudged against him in the circuit court.” I wish to here call the court’s attention to the fact that the word “bonds” in the fourth line of section 1551 is a misprint. The word should be in the singular

number "bond." This is apparent, not only from the context of the statute when it speaks of "the further condition" in the "bond", but also from an examination of section 1479 of the Code of 1892 (of which this section is a rescript) where the word "bond" is used. Also the singular number "bond" is used in the same connection in section 3129, Code of 1880.

Now it will be seen that section 1561, Code of 1906, provides for no appeal from the requirement to give the peace and good behavior bond, but does provide that the court may order him (the convict) "to stand committed until such bond be executed." Not until the requirement to give the bond be appealed from, but until the bond be, in fact, executed.

The contentions of the appellant are these: First: That all the sections above referred to relating to Peace Bonds, under the chapter on Criminal Procedure, must be construed together and in the light of each other, as being *in pari materia*. *Richards v. Patterson*, 30 Miss. 583; *Eskridge v. McGruder*, 45 Miss. 294; *Biloxi v. Borries*, 78 Miss. 658; *Holly Springs v. Marshall County*, 61 So. 703.

And that, thus construed, the only means by which an appeal can be prosecuted from an order requiring one to enter into a peace and good behavior bond under section 1561, Code 1906, is by pursuing the course mapped out by section 1551—by executing the peace and good behavior bond required, "with the further condition in the bond that the appellant shall pay all cost, in case it shall be adjudged against him in the circuit court;" or, second, if the first contention is untenable, that no appeal whatever lies from a requirement to execute a peace and good behavior bond after conviction, under section 1561, whether an appeal from the judgment imposing punishment be prosecuted or not. If either of these positions is correct, then the judgment here appealed from should be reversed.

As to the first: section 1561 applies to all manner of offenses less than felony. It applies with equal force to the offense of selling liquor and the offense of assault and battery, and to all other misdemeanor. Suppose, then, that an affidavit were made charging a person with assault and battery on the person of the affiant, and that during the course of the trial it should develop from the evidence that the defendant was not only guilty as charged, but that he had repeatedly assaulted and beaten the affiant on former occasions. Upon adjudging the defendant to be guilty of the specific offense charged, would not the trial court be authorized to require, in addition to the penalty imposed, that the defendant enter into bond to keep the peace and be of good behavior, under section 1561? Or would it be necessary that an affidavit be made under section 1548, and that the useless formality of a second trial of the same identical matters be gone through before the peace bond could be required? If the first question is answered in the affirmative, then could the benefit accruing from the placing of the defendant under bond under section 1561 be forestalled by the defendant prosecuting an appeal from the judgment of conviction, and thereby avoiding the necessity of executing the peace bond pending the appeal or would the peace bond be necessary prerequisite to the defendant's obtaining his liberty pending such appeal? If the necessity for giving the peace and good behavior bond pending appeal is, *ipso facto*, avoided by prosecuting an appeal from the judgment of conviction, it necessarily follows that in order for the person assaulted to obtain protection, and for some assurance to be given that the public order will be conserved during the pendency of the appeal, that another affidavit should thereupon be made against the defendant under section 1548, and that another trial of the same matter should be had before the court could carry into effect its order requiring the defendant to execute a peace and good behavior bond. If this is true, did the legislature intend any

such anomaly, and is this the "harmonious interpretation" within the meaning of the authorities? In addition to these observations the court will see that in the case of repeated assaults section 1548 would be inadequate unless the person charged had "threatened." If no threats had been made then a peace bond could not be required under that section. It could be required only under section 1561.

Cook, J., delivered the opinion of the court.

We think that this case is controlled by section 1561, Code 1906, alone. It will be observed that this section of the Code confers upon "every court before which any person shall be convicted of an offense less than a felony" the power to require the convict to execute a peace bond, "in addition to the penalty prescribed by law." The peace bond authorized by this section is an additional penalty which the court may or may not impose upon persons who have been convicted of a criminal offense. The general sections of the Code just preceding section 1561, relating to peace bonds, have no application to the peace bond required in this case.

We think the peace bond here was superseded when the convict executed his appeal bond, just as was the judgment taxing him with the costs of the prosecution, both of which were incident to and a part of the penalty imposed by the court.

Affirmed

GRAND LODGE COLORED KNIGHTS OF PYTHIAS v. HILL ET AL.

[70 South. 347.]

1. PARTIES. *Trial. Amendment. Lost instrument. Sufficiency of evidence.*

Where the administrator of the estate of a deceased brought suit upon a life insurance policy and it was subsequently discovered that the policy was payable to the wife and children of deceased, an amendment substituting them as plaintiffs should be allowed.

2. LOST INSTRUMENT. *Sufficiency of evidence.*

In a suit upon a lost life insurance policy, where its loss and contents were sought to be proven alone by a witness who had no personal knowledge that the policy had ever been issued, or that it had ever been lost or what it contained, a peremptory instruction for the plaintiff should not have been given.

APPEAL from the circuit court of Rankin county.

HON. C. L. DOBBS, Judge.

Suit by Charity Hill and others against the Grand Lodge of the Colored Knights of Pythias. From a judgment for plaintiff, defendant appeals.

A declaration was filed in the circuit court by one Robinson, administrator of the estate of Willis Hill, deceased, against the appellant for the recovery of a life insurance policy held by deceased in the appellant order. It was discovered afterwards that the policy of insurance was made payable to the wife and children of the deceased and on the day the case was called for trial a petition for leave to amend the declaration by substituting the names of his wife and children was filed and leave to amend granted. It was alleged that the policy of insurance was lost and a witness, Tobe Turner, the chancellor of the local lodge in which the deceased held his membership, was introduced for the purpose of proving the loss of the policy. Witness Turner in his testimony stated that a policy had been issued some years before to Willis Hill

and surrendered, and that application for a new policy had been made and the fee paid through him. He says he has never seen the new policy, however, but is positive that one was issued, and that it called for six hundred dollars. It was evident from his testimony that he had no personal knowledge that the policy had ever been issued, or that it had ever been lost, or its contents. On the trial the appellant offered in evidence the constitution and by-laws of the order, but the court declined to permit their introduction. The court then gave a peremptory instruction to find for plaintiffs, and the defendant appeals.

Latham & Latham, for appellants.

Stingily & McIntyre, for appellees.

SMITH, C. J., delivered the opinion of the court.

The court below committed no error in permitting the amended declaration to be filed, but should not have granted the peremptory instruction. The policy sued on was not introduced in evidence. Its loss and its contents were sought to be proven by the evidence of the witness Tobe Turner, but it is manifest from his testimony that he was without knowledge of either of these matters. We cannot tell from the record whether the court below erred in excluding appellant's constitution and by-laws from the evidence for the reason that it does not appear what these documents would have disclosed or what light they would have thrown upon the question at issue.

Reversed and remanded.

WILCZINSKI v. SMITH.

[70 South. 347.]

USURY. Rights and remedies of third persons. Application of payments.

A junior mortgagee is entitled to have the senior mortgagee's debt purged of usury, and where personal property covered by both mortgages has been delivered to the senior mortgagee without public sale, he must take it at its market value.

APPEAL from the chancery court of Bolivar county.

HON. M. E. DENTON, Chancellor.

Suit by Joel Wilczinski against C. R. Smith and others. From a decree in favor of defendants, complainant appeals.

This case was begun by the appellant, as complainant below, who filed a bill in the chancery court for an accounting and for a degree against the appellee for a certain indebtedness alleged to be due by J. E. King, and predicates his recovery on the fact that certain property of King, upon which appellant held a first mortgage, had been delivered to appellee, who held a second mortgage on the same property.

King has executed to appellant a certain promissory note for the sum of five hundred and fifty dollars bearing interest at ten per cent. from maturity. It developed that the principal of the note was five hundred dollars and fifty dollars was added in for interest. Said note was dated March 1, 1911, and matured January 1, 1911. Said note was secured by a deed of trust, covering certain personal property and the crops to be raised by King. Afterwards, on June 12, 1911, appellee took a second deed of trust on the same property.

The second deed of trust was duly placed of record in the Second district of Bolivar county, where the property was situated, and the first deed of trust was not recorded in the Second judicial district of said county, but was

recorded in the First judicial district. The bill charges that appellee had actual notice of appellant's deed of trust. Appellee denies that he had actual notice of the indebtedness, but admitted that he understood there was a prior deed of trust for five hundred dollars in favor of appellant. Appellee charges that the indebtedness secured by the appellant's deed of trust has been paid by the delivery of personal property to appellant of sufficient value to discharge the indebtedness. He charges also that usurious interest was charged in said note.

On the trial it was attempted to be shown that certain other indebtedness was due by King to the appellant, but the court objected to the introduction of any other account, and confined appellant to his note. Appellant then introduced two other notes not mentioned in the pleadings, one for two hundred and twenty dollars, and one for fifty-five dollars. The note for two hundred and twenty dollars was secured by the personal indorsement, it being shown by the testimony that appellant had declined to let King have the money unless he secured the note. The fifty-five dollar note was executed August 10th, and was not otherwise secured.

According to the evidence which was introduced, King delivered to appellant four mules and two wagons worth six hundred and ten dollars, and farming implements worth two hundred and thirty-five dollars, and five bales of cotton worth two hundred and sixty-eight dollars and twelve cents making a total of nine hundred and one dollars and sixty-two cents worth of property delivered by King to appellants. Appellant, however, had not given King credit for one mule, which died after delivery, and only credited him with three hundred dollars on the remaining three, and was attempting to charge King up with usurious interest on all three notes at ten per cent., when they ran for a term of less than one year, and interest for one full year was written in the face of the notes, and all bore interest after maturity, and was at-

tempting to charge him with the two hundred and twenty dollar note secured by personal indorsement.

The court held that according to the evidence, after eliminating usurious interest and giving proper credit for the personal property at its real value, that appellee was entitled to have the property so delivered upon which he held a second deed of trust credited on the first deed of trust, and that sufficient property had been delivered to pay the indebtedness sued for, and that the holder of the first lien having taken the personal property in extinguishment of the debt without public sale, must take it at its market value, and that the holder of the second lien was entitled to have it so applied.

Somerville & Somerville and J. B. Harris, for appellant.

We say, first, that the claim on the part of counsel that usurious interest was charged cannot be set up by Smith. Usury is a defense personal to the debtor and may be availed of by him alone, and this although the statute makes a contract for usurious interest absolutely void. See 39 Cyc., page 1062. Our statute does not make usurious contracts like the one in this case void, but merely forfeits the interest. Section 2678, Code of 1906. So, we think this disposes of this claim.

Thos. S. Owen, for appellees.

Under the well-settled doctrine, that when the first lienor takes the property in extinguishment of the lien, without a public sale of same, he will be held to have taken its market value, and will be liable to the junior lien holder for the full market value of the property. The appellant in this case must be held for the actual value of the property received, which more than paid the indebtedness of King.

Cook, J., delivered the opinion of the court.

Appellee, as a junior mortgagee, was entitled to have the payments made by J. E. King applied to the principal of the indebtedness. *McAlister v. Jerman*, 32 Miss. 142; *Chaffe v. Wilson*, 59 Miss. 42; *Boyd v. Warmack*, 62 Miss. 536.

By eliminating the usurious interest and by crediting J. E. King with the market value of the property delivered to appellant, we are unable to say that the chancery court erred in entering a decree in favor of C. R. Smith. There was a conflict of evidence as to the amount of credit King was entitled to, but this conflict was solved against appellant.

Affirmed.

MERRIN v. DE SOTO COUNTY.

[70 South. 348.]

1. EMINENT DOMAIN. *Alteration of highway. Damages to abutting owners. Set-off of benefits.*

Where in altering a public highway it was lowered to such a depth that it made it necessary for plaintiff to construct a new approach from the highway to his residence, he was entitled to recover at least the cost of constructing such new approach.

2. SAME.

In such case the county could not offset plaintiff's damages by the benefits accruing to plaintiff because of the improvement of the highway, where such benefits were such as were received by the general public and no more.

APPEAL from the circuit court of De Soto county.

HON. N. A. TAYLOR, Judge.

Suit by F. R. Merrin against De Soto county. From a judgment for defendant, plaintiff appeals.

Appellant was plaintiff in the court below, and appellee was defendant. An action was brought for damages to appellant's property by reason of the construction of a road past his premises, which it is alleged damaged his property, and especially the approach to his residence, since the road had been lowered to such a depth that it made it necessary for the appellant to construct a new approach from the highway to his residence. The defense set up by the county is that the plaintiff has really been benefitted by the construction of the road more than he has been damaged, since his property has enhanced in value. The case was submitted to a jury, and a verdict returned for the county, and, from a judgment for defendant, plaintiff appeals.

Lauderdale & Lauderdale and L. J. Farley, for appellant.

R. L. Dabney, for appellee.

Cook, J., delivered the opinion of the court.

All of the evidence in this case shows that appellant was damaged by the alteration of the public road abutting on his premises. All of the witnesses agreed that it would cost something to restore the *status quo*.

At the very least, a peremptory instruction should have been given for plaintiff, appellant here, telling the jury that they should allow the plaintiff such sum as would be necessary to reconstruct the roadway leading from the public highway into plaintiff's premises.

The alleged benefits to plaintiff because of the improvement of the highway were such benefits as were received by the general public, and no more, and this, of course, will not serve to offset his claim of damages.

Reversed and remanded.

YAZOO & M. V. R. Co. v. WALLS.

[70 South. 349.]

1. *CARRIERS. Carriage of passengers. Schedules. Duty of carrier's officers. Ejection. Trial. Instructions. Refusal.*

A railroad company has the right to so arrange its schedules that some of its trains will not stop at all of its stations, and in the absence of a special contract to the contrary is ordinarily under no obligation to stop its trains and discharge passengers at a station at which the train is not regularly scheduled to stop.

2. *CARRIERS. Carriage of passengers. Duty of carrier's officers.*

While it is true that the holder of a railroad ticket should inquire before embarking upon a train whether it will stop at the place to which he has purchased his ticket, nevertheless, the servants of a railroad company are not relieved of all duty in this connection toward a passenger who has mistakenly embarked upon a train not scheduled to stop at the place to which he has purchased a ticket. They should inform him of that fact upon their discovery thereof, so that he may disembark at a regular stop, if any, before reaching his destination and continue his journey on another train.

3. *SAME.*

If the employees of the company negligently fail to discharge this duty to such a passenger, they have no right thereafter to deal with him in such a manner as to impose undue inconvenience and discomfort upon him in reaching his destination. They have no right to eject him from the train between stations, on a dark and rainy night, at a place with which he is not familiar, even though he fails to pay his fare to the next regular stop.

4. *TRIAL. Instructions. Refusal.*

The error complained of, if error in fact there is, in appellee's first instruction, set out in dissenting opinion, was cured by the granting of appellant's fifth instruction set out in the facts in this case.

APPEAL from the circuit court of Sharkey county.

HON. H. C. MOUNGEE, Judge.

Suit by Henry Walls against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

This is an appeal from a judgment against appellant for two thousand and five hundred dollars damages, alleged to have been sustained by appellee as the result of a fall from a trestle on appellant's road after having been wrongfully ejected from one of its passenger trains. On January 9, 1913, appellee purchased from appellant's agent a ticket from Duncan to Hardee, a station on appellant's line south of Duncan. This ticket reads as follows:

"Y. & M. V. Railroad Company
One Passage

Duncan, Miss., to Hardee, Miss.

Good one day from date of sale for continuous trip via short line on train scheduled to stop at destination; otherwise, passenger must transfer to local train."

A few minutes after appellee purchased this ticket he boarded one of appellant's south-bound passenger trains, not scheduled to stop at Hardee; its stop nearest thereto before reaching Hardee being Rolling Fork. Appellee did not read his ticket, nor did he know that the train would not stop at Hardee. The ticket was handed by appellee to the conductor of the train shortly after leaving Duncan, who punched it and handed it back to him. According to the testimony for appellant, the conductor, when he returned appellee's ticket, informed him that the train would not stop at Hardee, and that he would have to leave it at Rolling Fork, and continue his journey on another train, which would pass Rolling Fork the next morning. This was denied by appellee, who stated that the conductor returned him his ticket without comment. After passing Rolling Fork the conductor informed appellee that the train would not stop at Hardee; that if he remained on the train he would have to go through to Vicksburg, the next regular stop of the train, and pay the sum of fifty-seven cents, the fare from Hardee to that point. Appellee, having no money, was unable to pay this additional fare, whereupon he was ejected from the train. This occurred, according to the testimony of ap-

pellee, about twelve o'clock on a dark, rainy night, between Egremont and Cary (which are stated in the brief of counsel for appellant to be "four and eight miles, respectively, below Rolling Fork") in a field, the size of which does not appear, surrounded by woods and hedges. According to the testimony of appellant, the ejection occurred about three-quarters of a mile south of Rolling Fork, and it was not raining at the time, though it had been earlier in the night. After appellee was put off the train he walked down the track about forty or fifty yards, and either stepped off or fell through a trestle, which he failed to see and did not know was there. He was rendered unconscious by this fall, and remained so for some time. About three or four o'clock in the morning he succeeded in reaching a house about four hundred or five hundred yards from this trestle, and by the occupant thereof was cared for and carried the next day to Cary, and from there he went to Vicksburg, where he was treated for his injuries. According to his testimony he suffered considerably and was not well at the time of the trial. His physician corroborated him as to the suffering, and stated that his body had bruises on it the day after the injury; that one of his kidneys was lacerated, and while he then—at the time of the trial—appeared to be free from pain, his injury was permanent.

The second and third instructions, requested by appellant, and refused by the trial court, and which are referred to in the opinion, are as follows:

"No. 2. The court instructs the jury that the mere fact that plaintiff held a ticket from Duncan to Hardee, and got aboard train No. 15 unless some special contract is shown whereby he was entitled to be carried on said train No. 15, did not entitle him to ride to Hardee on said train No. 15 on the night in question in this case, and the jury will find a verdict for the defendant.

"No. 3. The court instructs the jury that the railroad company has a right to establish a schedule whereby fast trains do not stop at all stations, and it makes no dif-

ference that the holder of a ticket, at the time he purchases it, is not aware that the particular train in question in this case does not stop at his station; and unless the jury in this case believe from the evidence that the agent at Duncan, in the scope of his authority, made a special contract, other than as shown by the ticket in evidence in this case, with the plaintiff, to stop the train at Hardee, you will find a verdict for the defendant."

The fifth instruction, granted at the request of the appellant, is as follows:

"No. 5. The court instructs the jury that if you believe from the evidence that Conductor Kagler told the plaintiff, before he reached Rolling Fork, that he would have to get off and change trains, and could not go to Hardee on train No. 15, the train in question, then the plaintiff had no right to stay on the train, and you must find a verdict for the defendant."

The first instruction, granted at the request of the appellee, is set out in the dissenting opinion.

Mayes & Mayes, for appellant.

It is now too well settled to admit of argument that it is the duty of a passenger to inform himself of the movements of trains before boarding one; he must ascertain when, how and where he can go under the provisions of his ticket and the regulations of the carrier. And if he fails so to do, and makes a mistake uninduced by the carrier, he is without remedy for being ejected from the train upon which he has no right to ride, under the provisions of his ticket, or the regulations of the carrier. *Dietrick v. Penn. R. Co.*, 71 Pa. St. 432.

"It is also well settled that one who buys a ticket is bound to inform himself of the rules and regulations of the company governing the transit and conduct of its trains. Thus, he must ascertain the train in which he is to go, its stopping stations, his right to get off and get on, to resume his trips, etc." *Randolph v. Chicago, etc., R.*

Co., 53 Ill. 510; *Atchison, etc. R. Co. v. Gants*, 38 Kan. 608.

"The law is well settled that, in the absence of statutory provisions to the contrary, a railroad company may adopt a regulation that a certain train or trains of passenger cars running regularly on its road shall not stop at designated stations or places; and it is the duty of a person about to take passage on a railroad train to inform himself when, where and how he can go or stop, according to the regulations of the company (citations). In this state there is no statutory provision to the contrary, and as the train upon which Gants took passage was not to stop, under the regulations of the company, until it reached Florence, the conductor had the right, after the train started, to stop the train and require Gants to leave it, if he refused to pay the fare which, in addition to the sum paid for his ticket; would have entitled him to ride to Florence" (Citations.). See Also: *Railroad Co. v. Swarthout*, 67 Ind. 567; *McRae v. Railroad Co.*, 88 N. Car. 526; *Schiffler v. Railroad Co.*, 65 Am. St. Rep. 35, and note; *Johnson v. Railroad*, 46 N. H. 213; *Railroad Co. v. Bartram*, 11 Ohio St. 457; *Beauchamp v. Railroad*, 56 Tex. 239; *Carter v. Railroad Co.*, 75 S. C. 355; *Duling v. Railroad Co.*, 66 Md. 120; *Logan v. Railroad Co.*, 77 Mo. 663; *Plott v. Railroad Co.*, 63 Wis. 511; *Railroad Co. v. Miles* (Ky), 37 S. W. 486; *Railroad Co. v. Bell* (Texas), 87 S. W. 730; *Scott v. Railroad Co.*, 144 Ind. 125; *Railway Co. v. Lightcap*, 7 Ind. App. 249; Note 2 Am. & Eng. Ann., p. 1080. See, also, opinion of GRAHAM, C. J., in margin of reported case, page 1078.

Later cases are collected in a note to *Louisville etc. R. Co. v. Scott*, Anno. Cas., 1912 C., page 552, second column.

No. 2. The court instructs the jury that the mere fact that plaintiff held a ticket from Duncan to Hardee and got aboard train No. 15, unless some special contract is shown whereby he was entitled to be carried on said train, No. 15, did not entitle him to ride to Hardee on said train

No. 15 on the night in question in this case and the jury will find a verdict for the defendant."

"No. 3. The court instructs the jury that the railroad company has a right to establish a schedule whereby fast trains do not stop at all stations, and it makes no difference that the holder of a ticket at the time he purchases it is not aware that the particular train in question in this case does not stop at his station, and unless the jury in this case believe from the evidence that the agent at Duncan in the scope of his authority made a special contract other than as shown by the ticket in evidence in this case with the plaintiff to stop said train at Hardee, you will find a verdict for the defendant."

These instructions correctly announce the law, and their refusal was manifestly reversible error. Authorities *supra*. See, also *Nazum v. Pittsburg, etc. R. Co.*, 50 Ind. 141, *infra*; *Wells v. Railroad Co.*, 67 Miss. 24; *Rodgers v. Railroad Co.*, 80 Miss. 200.

At the request of appellee, the Court granted the following instructions: Instructions given for plaintiff.

"The court instructs the jury that if they believe from the evidence that plaintiff bought a ticket at Duncan, Mississippi, on the 9th day of January, 1913, entitling him to transportation to Hardee, Mississippi, a short while before the arrival of one of defendant's passenger trains, going from Duncan to Hardee, and that plaintiff thereupon took passage on the said passenger train of the defendant Company, en route to Hardee, his destination, and that after leaving Rolling Fork, a station on defendant's line of railroad, the agents, servants and employees of said defendant company, forcibly ejected plaintiff from said train at midnight, at a point which was not a station on the line of said defendant's railroad, and before he reached his destination aforesaid, then they will find for the plaintiff and assess his damages" etc.

Note this instruction does not require the jury to believe that appellee boarded this train at the inducement of appellant's servants, or that he was not told before

the train reached Rolling Fork that he would have to transfer at that point—nor, for that matter, even that he was ignorant of the train's schedule.

Railroad companies are permitted to establish depots, and arrange their schedules for the safe and proper management of their trains, and a passenger has no right to travel to his destination on any and all trains, merely because he holds a ticket to that place. *Wells v. Railroad Co.*, 67 Miss. 24; *Rodgers v. Railroad Co.*, 80 Miss. 200; *Authorities supra*.

The proposition announced in this instruction seems to be that appellee was sold a ticket to Hardee "a short while before the arrival of one of appellant's passenger trains, going from Duncan to Hardee," this amounting to a special contract to carry appellee to his destination on that train. This identical instruction was condemned in *Nazum v. Pittsburg, etc. R. Co.*, 50 Ind. 141, 19 Am. Rep. 703, one of the leading American authorities on the question involved in this case. There, as here, plaintiff, shortly after purchasing his ticket, boarded a train which had just arrived, and was not scheduled to stop at his destination.

At the request of appellee, the court instructed the jury as follows: "If the jury find that plaintiff purchased a ticket for Sweetser, and that the train which he entered was the first train due after the purchase, he had a right to enter that train unless he was informed that the train would not stop at Sweetser before he entered the train."

"We think this instruction was wrong. It amounted to saying to the jury that, notwithstanding that appellant ran two daily trains which stopped at Sweetser, yet, if the train upon which he (appellee) took passage was the first train due at Union City (point of departure) after he purchased his ticket, the appellant was bound to have it stopped at Sweetser to allow the appellee to get off, although, by the regulations of appellant, that train was not allowed to stop at that station. But under such circumstances the appellant was not bound to stop this train

at Sweetser . . . It was the duty of the appellee to inform himself when, where and how he could go and stop according to the regulations of appellant's trains, and if he made a mistake which was not induced by the appellant, he has no remedy." See, also, *Railway Co. v. Swarthout*, 67 Ind. 567, *supra*.

The following instruction was also secured by appellee: "No. 3. The court instructs the jury that if they find for the plaintiff, that in assessing his damages that they may take into consideration the physical injury, if they believe from the evidence that he suffered such physical injury, and may also take into consideration his present physical pain and suffering and mental pain as result of said physical injury, if they believe from the evidence that he was so injured, and so suffers, and they may also take into consideration such other future suffering both physical and mental, as they may believe from the evidence plaintiff will suffer as a result of the said physical injury, if the jury believe that he will so suffer, and bring in their verdict in such a sum as the jury may think from the evidence he is entitled to, not to exceed," etc.

Plaintiff had no right whatever to this instruction, authorizing the jury to consider his present and future physical pain and mental suffering. Appellee's own physician and witness stated positively that he had examined appellee that day, and all soreness had disappeared.

See record, page 29: "Q. Well have you examined him since; did you examine him today? A. I did; that is I could merely take his word today; the soreness is gone and unless I could make a further examination or use the X ray I would be unable to tell about the condition of the kidneys now."

This court has frequently held that the giving of instructions not justified by the evidence is reversible error, whether such instructions are correct, as abstract statements of the law, or not.

Further, and independently—even if it be considered, *arguendo*, that the conductor had no right to put off the appellee, yet still a case of liability against the railroad was not made out; at least not for any substantial damages.

The illegal (?) act of putting him off was not the proximate cause of the personal injury which is the real gist of his complaint. Such injury could not have been reasonably foreseen as a probable result of his exclusion. There was an intervening pure accident.

The court will observe: Our contention is, not that the appellee is debarred from recovering because of his contributory negligence in falling into the trestle; but that the exclusion from the train was not, in any legal sense the proximate cause of his injury from so falling in. *Lewis v. Railroad Co.*, 54 Mich. 55; *Conway v. Railroad Co.*, 90 Me. 199; *Lynch v. Transit Co.*, 102 Mo. App. 30; *Haley v. Transit Co.*, 179 Mo. 30; *Milwaukee R. Co. v. Kellogg*, 94 U. S. 469, 475.

Jas. D. Thames, for appellee.

We do not think that the questions of law presented in the brief of counsel for appellant will give the court much concern, and we respectfully submit that none of the authorities cited by them are at all in point. On the other hand, we confess that by reason of the fact that this case arose out of and depends upon the peculiar method adopted by appellant for the operation of its trains, it is impossible to find any case squarely in point.

The undisputed evidence shows that under appellant's regulations the train which appellee took was a proper train for him to have taken to go from Duncan to Hardee, but that in order to make this trip it is necessary to leave the train at Rolling Fork at a late hour of the night, and spend the night there, and about eight o'clock the next morning take a south bound local, which is scheduled to stop at Hardee. Hardee is only about twenty miles from

Rolling Fork, and owing to this extraordinary arrangement what would ordinarily be a run of a few hours from Duncan to that place becomes a journey of seventeen or eighteen hours. It is owing to the fact that appellee, who, as I have said, is an ignorant negro, was unfamiliar with this extraordinary and intricate movement of appellant's trains, and that it did not condescend to vouchsafe him any information on the subject, that he received his injuries.

The case was submitted to the jury, which found a verdict for two thousand and five hundred dollars, based upon instructions to which we will hereafter allude and of which appellant here complains.

Aside from the very technical and faintly urged objections to these instructions, appellant bases its whole case upon the proposition that it was the duty of the appellee to inform himself fully of all of the details concerning the movement of appellant's trains, and that he should at his peril have known that he must change cars at Rolling Fork, and should have, without warning or suggestion on the part of its servants, in pursuance of such information, made this change.

Many cases are cited from other states, in which the general principle is announced that it is the duty of intending passengers to ascertain the proper trains for them to take, and whether or not they stop at the desired points of debarkation. I submit, however, that these broad principles have no application to the peculiar facts of the case at bar. In the first place, there can be no doubt that when appellee bought his ticket at Duncan the agent knew that he intended to take the train he did for Hardee, although it did not stop at that point, and that he gave no information on this subject. This testimony is undisputed. It is not a question, therefore, of appellee's having taken the wrong train. He took the train intended to transport passengers from Duncan to Hardee, and he did so with the full knowledge of the agent who sold him the ticket.

In the case at bar there was an invitation to the public generally and to appellee to use the particular train in question in order to be transported to Hardee and other points at which it was not scheduled to stop. I unhesitatingly assert that no further duty rested upon appellee or any other intending passenger than to ascertain which was the proper train for him to take to be carried to his destination, and that having done this the duty then devolved upon the railroad company to inform him of any exceptional regulations or conditions imposed by them which should require him to change trains and spend the night on the way.

When, therefore, appellant invited appellee to take the train he did to be transported to Hardee, and when its agent sold him a ticket to that point with full knowledge of the fact that he had accepted appellant's invitation, and did not tell him that the train upon which he thus embarked would not in fact stop at Hardee, although it accepted passengers destined for that point, by his very silence he entered into a special contract with appellee to transport him to his place of destination by a through and continuous passage, and not to change a run of a few hours into a lengthy journey, and impose upon him the expense, annoyance and delay of spending the night en-route.

However this may be, I submit with even greater confidence that when appellee presented his ticket to the conductor and he punched and returned it to him and accepted him as a passenger bound for Hardee without any statement or explanation that the train did not stop at that point, his conduct constituted a representation that he would be transported there in the usual manner. Furthermore, according to appellee's testimony, the conductor, although he knew that at the railroad company's invitation he had entered a train intended to transport passengers to Hardee, and although he further knew that under the rules and regulations of his employer the train was not scheduled to stop there, but that passengers

for that point must spend the night in Rolling Fork, still neglected to notify this ignorant man of that fact, and after passing Rolling Fork put him off in the woods at midnight, in a dangerous place, because he was not familiar with the intricate details of the railroad company's train operations.

Counsel say in their brief that the railroad company was under no duty to volunteer any information as to the movement of its trains, but that its passengers must inform themselves of all these things at their peril. I confidently submit that when the conductor accepted appellee's ticket for Hardee without comment and permitted him to go by Rolling Fork without notifying him that he must change cars there, he as the agent of the railroad company again entered into a special contract entitling appellee to be transported to and be put off at Hardee.

In none of the cases cited by counsel for appellant did any such condition of affairs exist.

SMITH, C. J., delivered the opinion of the court.

(After stating the facts as above). One of the assignments of error is that the court below erred in not granting appellant's request for a peremptory instruction. A railroad company has the right to so arrange its schedules that some of its trains will not stop at all of its stations, and in the absence of a special contract to the contrary is ordinarily under no obligation to stop its train and discharge a passenger at a station at which the train is not regularly scheduled to stop. *Wells v. Railroad Co.*, 67 Miss. 24, 6 So. 737.

It is also true, as stated by counsel for appellant, that the holder of a railway ticket should inquire before embarking upon a train whether it will stop at the place to which he has purchased his ticket. Nevertheless, the servants of a railroad company are not relieved of all duty in this connection toward a passenger who has mis-

takenly embarked upon a train not scheduled to stop at the place to which he has purchased a ticket. They should inform him of that fact upon their discovery thereof, so that he may disembark at a regular stop, if any, before reaching his destination and continue his journey on another train. *Plott v. Railroad Co.*, 63 Wis. 514, 23 N. W. 412.

If the employees of the company negligently fail to discharge this duty to such a passenger, they have not the right thereafter to deal with him in such manner as to impose undue inconvenience and discomfort upon him in reaching his destination. It may be that their duty towards him in this connection depends upon the circumstances of each particular case. This, however, we are not now called upon to determine, for they clearly have not the right to eject him from the train between stations, on a dark and rainy night, at a place with which he is not familiar, as was done in the case at bar according to the testimony of appellee.

Moreover, conceding for the sake of the argument that appellee forfeited his right to travel on appellant's train when he declined to pay the fare from Hardee to Vicksburg, its servants had the right to eject him from the train only at a place where he would be reasonably safe from injury. In ejecting a trespasser from a train, a railroad company is not required to consider his mere convenience, but reasonable care must be taken not to expose him to danger of being injured. 2 Moore on Carriers (2d Ed.) 1427; *Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780. Whether or not this duty was discharged is ordinarily a question for the jury.

What has been hereinbefore said disposes of the assignments of error predicated upon the refusal by the court below of appellant's second and third instructions.

The error complained of, if error in fact there is, in appellee's first instruction, was, under the foregoing views, cured by the granting of appellant's fifth instruction.

In view of the testimony that appellee's injury is permanent, we cannot say that the verdict was excessive.

We find no reversible error in the other matters complained of.

Affirmed.

STEVENS, J. (dissenting). I find myself unable to agree with the majority holding. My Brethern concede that a passenger "should inquire before embarking upon a train whether it will stop at a place to which he has purchased his ticket," yet they say:

"The servants of a railroad company are not relieved of all duty in this connection toward a passenger who has mistakenly embarked upon a train not scheduled to stop at the place to which he has purchased a ticket. They should inform him of that fact upon the discovery thereof."

Appellee in his own testimony says that when he purchased the ticket "there wasn't any conversation at all" with the ticket agent, or with any other agent or employee of the railroad company, at Duncan, where he boarded the train. The ticket itself gave appellee notice that it was good "on train scheduled to stop at destination." Appellee says he can read and write. The conductor simply punched his ticket and gave it back to appellee, who had, according to his own testimony, no conversation with the conductor whatever. Appellee was therefore not misled by any statement by or information derived from the conductor. This, therefore, is not a case where the passenger has been at all misled by any information given by the servants or employees of the railroad company, or by any well-known custom of the company. Admitting as true all the testimony on behalf of the plaintiff, a case is presented where the passenger embarked upon a fast train which he thought would stop at his destination, but which, in fact, by the undisputed testimony did not stop at this little station.

It appears to be conceded by appellant that the ticket in question would entitle appellee to ride on the fast train as far as Rolling Fork, the first stop before reaching Hardee, but that by the terms of the contract of carriage the passenger must there "transfer to local train." Indeed, this is the contract as shown on the face of the ticket. Under this contract there could be no criticism of the conductor for simply punching the ticket and handing it back to the passenger. The natural presumption from this act of the conductor is that the conductor recognized the right of appellee to transportation as far as Rolling Fork; and he returned the punched ticket to appellee in order that the latter might later use it on the local train. The passenger in this case did not, according to his statement, inform the conductor that he expected to remain on the fast train the entire journey. The conductor, therefore, was certainly not called upon to volunteer any information. I do not understand how the passenger could be under the duty of inquiring and knowing his destination, and whether the train upon which he seeks passage, under the rules and regulations of the railroad company, stops at such destination, and at the same time a similar duty should rest upon the servants of the railroad company to ascertain whether the passenger knows what he is about and understands his duty in the premises. In other words, the duty could not rest upon both; if so, the railroad company would be under obligation to detail a guardian for many passengers.

Our own court is fully committed to the holding that railroad companies "are permitted to establish their own depots, or stations, and to arrange their own schedules for the safe and proper movement and management of their trains," and that "to allow the caprice, or the wish, or even the seeming necessity, of an individual to procure stoppages of trains at unaccustomed points, and to disarrange the schedule fixed for their predetermined and regular movement, would be to permit, not only vast

property interests, but human lives, as well, to be certainly and recklessly put in peril." *Wells v. A. G. S. R. Co.*, 67 Miss. 24, 6 So. 737. The passenger "must ascertain the train in which he is to go, . . . its stopping stations, his right to get off and get on, to resume his trips," etc. *Dietrich v. Penn. R. Co.*, 71 Pa. 432, 10 Am. Rep. 711.

"It is the duty of a person, about to take passage on a railroad train, to inform himself when, where, and how he can go, or stop, according to the regulations of the . . . company." *Atchison, etc., R. Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, 5 Am. St. Rep. 780; *Railroad Co. v. Swarthout*, 67 Ind. 567, 33 Am. Rep. 104; *McRae v. Railroad Co.*, 88 N. C. 526, 43 Am. Rep. 745; *Schiffler v. Railway Co.*, 96 Wis. 141, 71 N. W. 97, 65 Am. St. Rep. 35, and note; *Johnson v. Railroad*, 46 N. H. 213, 88 Am. Dec. 199; *Railroad Co. v. Bartram*, 11 Ohio St. 457; *Beauchamp v. Railroad*, 56 Tex. 239; *Carter v. Railway Co.*, 75 S. C. 355, 55 S. E. 771; *Duling v. Railroad Co.*, 66 Md. 120, 6 Atl. 592; *Logan v. Railroad Co.*, 77 Mo. 663; *Plott v. Railway Co.*, 63 Wis. 511, 23 N. W. 412; *Railroad Co. v. Miles*, 100 Ky. 84, 37 S. W. 486; *Railroad Co. v. Bell*, 39 Tex. Civ. App. 412, 87 S. W. 730; *Scott v. Railway Co.*, 144 Ind. 125, 43 N. E. 133, 32 L. R. A. 154; *Railway Co. v. Lightcap*, 7 Ind. App. 249, 34 N. E. 243.

"When a person purchases a ticket, he should ascertain whether the train will only stop at the principal stations, or at all of them, before he gets on a passenger train; and were he to get on one which was not accustomed to stop at the station to which he desired to go, he would not, without an agreement to stop, have any right to insist upon the company's changing the course of their business for his accommodation. The requisite information can always be had from the agent when the ticket is purchased, and it is but reasonable to require passengers to obtain the information and to act upon it." *Chicago, etc., R. Co. v. Randolph*, 53 Ill. 510, 5 Am. Rep. 60.

This doctrine is fully recognized in the case of *Railroad Co. v. Rodgers*, 80 Miss. 200, 31 So. 581. As to this the decisions are practically in accord.

In the instant case, therefore, appellee was not by his contract of carriage entitled to passage on this limited train from Rolling Fork to Hardee, and having declined or being unable to pay his fare from Rolling Fork to the next regular stopping place of said train, the conductor had the right, properly exercised, to eject appellee at any reasonably safe place beyond Rolling Fork. Appellee had the right to the better accommodations provided by this fast train as far as Rolling Fork; and to that point, he was not, in any sense of the word, upon the wrong train. And in the absence of anything to indicate that the passenger had failed to inform himself, the conductor was not called upon to assume that appellee was ignorant of the schedule and movements of this particular train. I cannot, therefore, concur in the holding of the majority that the servants of the railroad company in this instance were called upon to volunteer to appellee any information whatever until after the train left Rolling Fork Railroad Companies, especially those doing an interstate business, are called upon to provide limited trains making few stops, to transport in the shortest possible time the United States mails and express, as well as passengers; and this is a question in which the public is more vitally interested than railroad companies. It would be an easy matter for any passenger to feign ignorance of a fast train schedule, and by remaining upon such a train force it to stop at any flag stop or small station, and thereby completely disorganize and plunge into reckless and dangerous chaos the movements and schedules of all important railroads.

“If it is understood by the public that the duty is on the traveler to inquire as to all such reasonable regulations as it may be important for him to know, we think there will result less inconvenience than from any holding of the law that tends to relieve the traveler from the

duty of inquiry as to a part of such matters of regulation." *Johnson v. Railroad Co., supra.*

It cannot be contended that the mere taking up of a ticket in this case constituted a special agreement.

"Should a person get on such a train, without the consent of the employees of the road, the taking up of his ticket merely, without an agreement to stop at the desired station, would not amount to an undertaking by the company to put him off at that place." *C. & A. R. R. Co. v. Randolph, supra.*

This contention was made in the case of *Wells v. A. G. S. R. R. Co., supra*, where the passenger paid fare to the conductor, and where a stronger case was presented for such holding than is here presented by the mere punching of appellee's ticket and returning it to him without comment.

The case of *Plott v. C. & N. W. R. R. Co.*, 63 Wis. 511, 23 N. W. 412, is cited by my Brethern as authority that a duty rests upon the servants of a railroad company to inform the passenger of the fact that the train does not stop at the place to which he has purchased a ticket. I do not think the facts in the Plott Case call for any such holding by the court. The facts in that case were that an officer of the railroad company did in fact notify the passenger at and before she left the junction of Elroy; and upon such information the passenger left the train at said junction before reaching her destination. All the court intended to say, therefore, on this subject, was that the railroad company had fully discharged its duty to the passenger; and the same opinion states:

"It is also held that it is the duty of the passenger to ascertain for himself whether the train upon which he takes passage will carry him and put him off at the destination to which he wishes to be carried," and "in order to entitle the plaintiff to recover damages in this action, it was incumbent on her to prove that she had either by express contract with some employee or agent of the companies, authorized to make the same, or ac-
110 Miss.—18.

cording to the rules and regulations of the companies, the right to be carried from St. Paul to Wonewoc on the same train on which she took passage at St. Paul. This, we think, she failed to prove upon the trial. The jury have found that the train on which she took passage did not ordinarily stop at Wonewoc, and the proof given on the trial that it had before that time occasionally stopped there to permit passengers to leave the cars there did not estop the company from running its train in the ordinary way, and make it its duty to stop on this occasion."

This case clearly placed the duty upon the passenger to inform himself, and fully sustains the views I have just expressed. The only duty resting on the servants of railroad companies in this connection is negative—not by any information actually given to mislead the passengers.

I do not take issue, however, with the majority holding that appellee could only be ejected at a place that would be reasonably safe. This theory of the case justified the refusal of instructions 2 and 3, asked by appellant, but, in my judgment, rendered inapplicable and erroneous instruction No. 1, given for the plaintiff, as follows:

"The court instructs the jury, that if they believe from the evidence that plaintiff bought a ticket at Duncan, Miss., on the 9th day of January, 1913, entitling him to transportation to Hardee, Miss., a short while before the arrival of one of defendant's trains, going from Duncan to Hardee, and that plaintiff thereupon took passage on the said passenger train of the defendant company, enroute to Hardee, his destination, and that after leaving Rolling Fork, a station on defendant's line of railroad, the agents, servants, and employees of said defendant company forcibly ejected plaintiff from said train at midnight, at a point which was not a station on the line of said defendant's railroad, and before he reached his des-

tionation aforesaid, then they will find for the plaintiff and assess his damages," etc.

This instruction does not squarely present this issue just mentioned, but seems to rely upon the absolute right of appellee to be transported to his destination. The granting of this instruction is, in my judgment, reversible error. I think the cause should be reversed and remanded for a new trial on the issue as stated in the case of *Jackson v. Railroad Company*, 76 Miss. 703, 25 So. 353:

"Whether, at the time and place and under the circumstances, the right of ejection in this instance was properly exercised."

KOHN, WEIL & Co. v. WEINBERG ET AL.

[70 South, 353.]

BANKRUPTCY. *Effect on pending actions. Validity of judgment.*

Where a plaintiff recovered a judgment against defendant before a justice of the peace and defendant gave bond and appealed to the circuit court, and thereafter defendant was adjudged a bankrupt, but had not been granted a discharge before his case was brought to trial in the circuit court, and judgment was rendered against him and the sureties on his bond in that court, the bankruptcy court having authorized the plaintiff to proceed to judgment. In such case the circuit court had jurisdiction of the parties and the subject-matter, and its judgment was valid against the defendant and his sureties and a subsequent discharge in bankruptcy of defendant did not relieve his sureties.

APPEAL from the chancery court of Sunflower county.

HON. E. N. THOMAS, Chancellor.

Suit by A. Weinberg and others against Kohn, Weil & Co. From a decree in favor of complainants, defendant appeals.

The agreed statement of facts is as follows:

Statement of the case.

[110 Miss.]

It is agreed by and between the parties complainant and defendant, that on the 16th day of November, 1911, Kohn, Weil & Co. filed suit in the justice of the peace court of P. F. P. Herring versus Abe Weinberg for one hundred and eighty-two dollars and twenty-five cents, and that he was properly summoned to appear and defend the same; that judgment was entered by default on November 28, 1911, against Abe Weinberg for the sum of one hundred and eighty-five dollars and twenty-five cents, with interest thereon; that within five days thereafter Abe Weinberg filed his appeal bond to the circuit court of Sunflower, with P. F. P. Herring justice of the peace, with I. Harris and Joe Zachariah as sureties, appealing the judgment rendered in favor of Kohn, Weil & Co. to said circuit court.

It is fully agreed that on or about the 29th day of December, 1911, Abe Weinberg filed a voluntary petition in bankruptcy, in the district court of the United States for the western division of the southern district of Mississippi, sitting in bankruptcy, which court had exclusive jurisdiction over bankruptcy matters; that he was immediately adjudicated a bankrupt by said bankruptcy court, and a receiver was appointed to take charge of his bankrupt estate, and as soon as possible thereafter a trustee was elected and took charge of his said bankrupt estate; and that within forty days after the filing of his petition in bankruptcy and having been adjudicated a bankrupt, he filed a petition for a discharge with the clerk of the district court of the United States for the western division of southern district of Mississippi, that being the proper officer with whom said petition should be filed.

It is further agreed that his assets were sold by the trustee in bankruptcy and the proceeds of said sale distributed among his creditors.

It is further agreed that Kohn, Weil & Co. was a *bona fide* creditor of the said Abe Weinberg, and that in his schedule filed in bankruptcy he scheduled their said ac-

count, giving the amount due, their name, and place of residence, and that Kohn, Weil & Co. received notice of the filing of the petition in bankruptcy.

It is further agreed that Kohn, Weil, & Co. filed their account in bankruptcy, by making the proper and necessary proof and affidavit thereto, proving said account as an unsecured account, according to the forms in bankruptcy, and that they filed the same with M. D. Landau, referee in bankruptcy of the district court of the United States, in which district said petition of Abe Weinberg was pending; that the account filed in the bankrupt court by Kohn, Weil & Co. was the identical account sued on in the justice of the peace court of P. F. P. Herring at the time above mentioned, that being, the suit appealed to the circuit court, and on which judgment was there rendered, and the same account the collection of which in the form of a judgment by the circuit court of Sunflower, Miss., this suit was filed to enjoin.

It is further agreed that the judgment rendered by the circuit court of Sunflower, Miss., was rendered at the October term, 1912, of the said circuit court, some six months after the petition in bankruptcy had been filed by Abe Weinberg, bankrupt, and that prior to the trial of said cause in said circuit court the said Abe Weinberg filed a petition in said circuit court, asking that all proceedings in that court be stayed until the question of his discharge by the bankrupt court be passed upon, and that Kohn, Weil & Co. procured an order from H. C. Niles, Judge of the district court of the United States for the district of Mississippi, permitting the circuit court to proceed to judgment in said cause.

'It is further agreed that immediately after the petition for a discharge had been filed by the said Abe Weinberg in the district court of the United States, Kohn, Weil & Co. filed objections to the discharge, in which they alleged all of the statutory grounds to discharge of the said Weinberg, and that proof had been taken on the objections filed to his discharge, and submitted to the

referee in bankruptcy, to whom the petition for discharge had been referred, and that he had passed upon the same, and certified his findings to H. C. Niles, Judge of the district court, and recommended the granting of the discharge prior to the trial of said cause in the circuit court of Sunflower county, and that the discharge was granted after the trial of said suit in said circuit court, and a month or so after this bill was filed.

It is further agreed that the amount due Kohn, Weil, & Co., by Abe Weinberg was for goods, wares, and merchandise bought in the ordinary course of business, and that immediately after the rendition of the judgment in the circuit court of Sunflower county, Kohn, Weil, & Co. withdrew their objections to the discharge of Weinberg.

It is further agreed that after the assets belonging to the bankrupt estate of Abe Weinberg had been converted into money by the trustee, the referee in bankruptcy, after paying the expenses of administration of his said bankrupt estate, declared a dividend as between the creditors of the said Weinberg, and paid out to them in such dividend all of the funds derived from the bankrupt's estate, and that Kohn, Weil & Co. received as their share of the dividend the sum of \$—, which amount was accepted by them, before judgment was rendered in its favor by said circuit court.

It is further agreed that this cause be submitted to the court on this agreed statement of facts, and the trial proceed thereon, as if all the facts alleged herein had been properly proven by depositions of witnesses.

Moody & Handy, for appellant.

In this case Weinberg had been adjudged a bankrupt when the state court was advised of the proceedings in the bankrupt court. He had not obtained from the bankrupt court an order staying all proceedings in the state court, but on the contrary the plaintiff in that case, the appellant here, had obtained an order from the bankrupt

court authorizing it to proceed to final judgment in that case. Therefore, if we are correct in our construction of the Bankrupt Act of 1898 to the effect that after adjudication, the matter of a stay of all proceedings in a cause pending in a state court then surely the judgment complained of was properly rendered for the reason that both the bankrupt court in granting the order to plaintiff to proceed, and the state court, in permitting it to proceed, exercised the discretion vested in them by the statute.

If your honors will carefully compare section 11 of the Bankrupt Act of 1898 with section 5106 of the Bankrupt Act of 1867, you will be impressed with the difference between the two statutes. In the latter it is made clear that all proceedings both before and after adjudication shall be stayed until after the question of the debtor's discharge has been determined, except where there is unreasonable delay, and except where the amount claimed is in dispute, in which latter event the cause may proceed to judgment for the purpose of ascertaining the amount due, but for that purpose only. But by the former statute, you will observe, that all proceedings in such a cause shall before adjudication, and only before adjudication, be stayed. After adjudication and after an application for a discharge has been filed all proceedings may or may not be stayed as the bankrupt court may determine. In the latter statute the word shall, is used and by virtue of the statute alone all proceedings must be stayed, except in the two instances named. In the former statute the word shall has reference to the stay of proceedings before adjudication. After adjudication the word may is used, showing clearly that it was the intention of Congress to leave to the discretion of the court the question of stay. Though before adjudication the question of a stay was not to be left to the discretion of the court.

We are not unaware of the rulings of this court in the case of *Goyer Company v. Jones*, 79 Miss. 253. This

court in that case held that inasmuch as the liability of the sureties on an appeal bond was conditioned for the payment of such judgment as might be rendered against the principal obligor in that bond, that if no judgment could be rendered against the principal obligor, no judgment could be rendered against the sureties. Therefore, if before the trial, the principal in an appeal bond, had been discharged in bankruptcy, no judgment could be rendered against him, and if no judgment could be rendered against him, no judgment could be rendered against the sureties. The reasoning in that case is sound and the conclusion is correct, but that is not the case presented to the court now. At the time our case came up for trial, the principal in the appeal bond, Weinberg, had not been discharged in bankruptcy, nor did he plead any discharge in bar of a recovery. He claimed that he had been adjudged bankrupt and asked that all proceedings in that suit be stayed pending the hearing of his application for a discharge. To that we replied that the question of a stay in proceedings in this case is left to the discretion of the bankrupt court, and that the bankrupt court had entered an order authorizing us to proceed to judgment in that cause. The lower court (the circuit court), held that the question of a stay was in the discretion of the bankrupt court and permitted the cause to proceed to trial and thereupon judgment was rendered as provided by the statutes, against Weinberg and the sureties on his appeal bond.

That cause was by the bankrupt court permitted to proceed to final judgment, not because there was unreasonable delay on the part of the bankrupt in applying for a discharge, and not because the amount due was in dispute, but on the contrary for the purpose of enabling the plaintiff in that suit to recover judgment against the sureties on the appeal bond, and thereby enforce a liability against them created before any bankruptcy proceedings were instituted. True, the bankrupt court, under the Act of 1867 could only allow the

cause to proceed in a state court where there was unreasonable delay on the part of the bankrupt in applying for his discharge or where the amount due was in dispute, but under the Bankrupt Act of 1898 there is no such limitation placed on the power or authority of the bankrupt court. Under the Act of 1898 the bankrupt court has authority to permit the cause to proceed to trial for any and all purposes whatever, while, as stated, under the Act of 1867 that court could only permit the cause to proceed to trial where there was an unreasonable delay or where the amount due was in dispute. The liability of Zachariah and Harris as sureties for Weinberg was created more than a month prior to the filing of the petition in bankruptcy by the latter. True this was a conditional liability and not an absolute one. They were not bound under any and all circumstances. But when the contingency upon which their promise to pay was conditioned, occurred, their liability became absolute and they were as much bound as if the liability had been absolute in the first instance. Their liability was conditioned for the payment of such judgment as might be rendered against Weinberg, not for the payment of such judgment as should be rendered against Weinberg and enforceable out of his estate. The facts of our case, as stated, are essentially different from the facts in *Goyer Company v. Jones, supra*. In the *Goyer Company* case no judgment could be rendered against the bankrupt because of his discharge, so none could be rendered against the sureties on his appeal bond. But in our case judgment could be and was, by leave of the bankrupt court, rendered against Weinberg as principal, and as the condition of the bond was for the payment of such judgment as might be rendered against the principal, and as the statute provides that in all cases where judgment is rendered against the principal, judgment can also be rendered against the sureties, the judgment rendered by the circuit court was not even erroneous, much less void.

It must be kept in mind that the judgment rendered by the circuit court against Weinberg as principal and Zachariah and Harris as sureties on the appeal bond, has never been appealed from. The bill in this cause was filed in the chancery court and the chancery court is asked to nullify a judgment rendered by the circuit court. Even if a judgment was erroneous, the chancery court is without power to grant relief. But, as stated, the judgment is not even erroneous, much less void. See *In re Franklin*, 106 Fed. 666.

Effect of the discharge of the bankrupt.

Judgment was rendered by the justice of the peace in favor of the appellant against Weinberg on November 28, 1911. On that day Weinberg filed an appeal bond with Zachariah and Harris as sureties. This bond was conditioned, as prescribed by section 83 of the Code, "for the payment of such judgment as may be rendered" by the circuit court against Weinberg. At the time this judgment was rendered no bankruptcy proceedings had been instituted as Weinberg did not file a petition in bankruptcy until December 29, 1911. When the case came on for trial in the circuit court that court, as provided by section 86 of the Code, when judgment was rendered against Weinberg, also entered judgment against Zachariah and Harris as the sureties on Weinberg's appeal bond. Subsequent to the rendition of this judgment, Weinberg, Zachariah and Harris filed the original bill in this cause in the chancery court, and at the time this bill was filed Weinberg had not even been discharged in bankruptcy. However, before this case came on for final hearing, Weinberg was discharged in bankruptcy and it is now claimed that the debt on which judgment was rendered was one provable in bankruptcy against Weinberg and that his discharge operated to release not only Weinberg from any liability on this judgment, but also to release Zachariah and Harris, the sureties against

whom the judgment was also rendered. Therefore the question presented for the decision of the court is, does the discharge in bankruptcy of a principal, subsequent to the rendition of a judgment against him and the sureties on his appeal bond have the effect of discharging such sureties from any liability on such judgment.

If the discharge had been obtained prior to the time the case was tried in the circuit court, as a matter of course judgment could not have been entered against the sureties on the appeal bond for their obligation was conditioned only for the payment of such judgment as might be rendered against the principal and as the principal was discharged in bankruptcy and no judgment could be rendered against the principal because of that, of course no judgment could be rendered against the sureties. This was the holding of the supreme court of the United States in the case of *Wolf v. Stix*, 99 U. S. 1. This was also the holding of this court in the case of *Goyer Company v. Jones*, 79 Miss. 253. But this is not now the question presented for the decision of this court. Here a judgment has been entered not only against the principal but also against the sureties and a discharge was obtained long after the rendition of this judgment.

A creditor having a judgment against both principal and surety may cause the property of either to be taken to effect the payment of the debt. That this is the law there can be no doubt but see 27 Am. & Eng. Ency. Law (2 Ed.), p. 64 and cases cited.

It is true that the rights of a surety in a judgment are in some particulars protected by statute in this state, but in the case at bar no statutory right is asserted by any of the appellees apart from statutory provisions the grounds upon which sureties may be discharged fall under two main heads, and they are: 1st, discharge by the extinguishment, satisfaction, release or change of the principal contract; 2nd, discharge by acts *in pais*. 27 Am. & Eng. Enc. of Law (2 Ed.), 489.

While we understand this to be the law, still before a surety can claim a discharge, something more than the mere release of the principal by operation of law must be shown. In the case before the court it is not claimed that the judgment complained of was extinguished, satisfied or released by a performance, payment, tender of payment, release, or by any act of the judgment creditor. The only claim made is that the principal debtor in the judgment has been, by operation of law, discharged from any liability on the judgment because of his discharge in bankruptcy. Of course if the creditor had released the principal from any liability on such judgment such action on his part might also release the surety, but that would be because of some act of the creditor. But the same result in no wise follows where the principal is released by operation of law.

In support of this contention we refer the court to the following authorities: "The surety is not discharged where the plaintiff, instead of being discharged by the creditor, owes his discharge to an act of law, as where he is discharged in bankruptcy or insolvency proceedings, or where the action against him is barred by limitations." 27 Am & Eng. Ency. of Law (2 Ed.), 493 and case cited; *Whereatt v. Ellis*, 74 Am. St. Rep. 865; *Wolf v. Stix*, 99 U. S. 1; *Odell v. Wooten*, 38 Ga. 225; Brandt on Suretyship & Guarantee, section 150; *Phillips v. Solomon*, 42 Ga. 192.

But it may be contended that this rule was changed by the Bankrupt Act of 1898 but this, of course, we deny for the reason that the Federal Statute re-announces and reaffirms the common-law rule on this subject. By section 16 of the Bankruptcy Act of 1898 it is expressly provided that "the liability of a person who is a co-debtor with, or guarantor or in any manner a surety for a bankrupt, shall not be altered by the discharge of such bankrupt."

After the liability of the surety to the creditor has ceased to be contingent and has become fixed, it does

seem to us that in view of this statute there could be no question that a subsequent discharge of the principal in nowise effects the liability of the surety to the creditor. It does seem that this would be a correct conclusion, even if the common-law rule on the subject was different.

Frank E. Everett, for appellees.

Counsel for appellant endeavors to draw a distinction between the meaning of section 11, of the Bankrupt Act of 1898 and section 5106 of the Bankrupt Act of 1867. This same distinction was drawn in the chancery court on the trial of this cause but the chancellor correctly decided there was no difference in the meaning of the two acts. The contention made in the brief of counsel for appellant would mean, if enacted into law, the abrogation of the bankrupt law *in toto*. Before passing upon these two statutes, let us see if there are not other bankrupt statutes which apply to this case and which must be construed with the two now under consideration.

Under paragraph 12 of section 1, "Meaning of Words and Phrases," it is declared that "discharge" shall mean the release of a bankrupt from all of his debts which are provable in bankruptcy, except such as are excepted by this act."

Section 17 of the same act provides the exception referred to in the bankruptcy act, and which are, 1. Taxes levied by United States, state, county, district or municipality in which he resides; 2. Judgments in actions for fraud, false pretense or wilful and malicious injury to person or property; 3. Those which have not been scheduled in time for proof and allowance, except where the party had actual knowledge of the bankrupt proceedings; 4. Where the debt is created by fraud, embezzlement or defalcation while acting as an officer or in any fiduciary capacity. Only those debts mentioned in section 17 are not dischargeable.

By reference to the record in this case (I cannot refer the court to the page because I have not the record before me), but by reference thereto, the court will see the "stipulation of counsel" upon which this case was submitted to the chancellor. In that it will be seen that the debt sued on here is the same debt that was proved in bankruptcy and on which a dividend was declared and paid to appellant and received and accepted by it long prior to the trial of this case in the circuit court of Sunflower county. It is therefore my contention when the appellant filed its account in the bankrupt court and participated in the dividend, its account being one dischargeable under the bankrupt law, it was then precluded from saying that its account had not been paid and cannot go into any other court and try to enforce the collection of the remainder of its debts. It will be noticed that appellant in its suit in the circuit court and in the judgment rendered there, does not give credit for the amount of the dividend it received from the bankrupt court. In support of this contention, I cite the following authorities: *Chapman v. Forsythe*, 11 L. Ed. (U. S.) 236; *Goodman v. Herman*, 172 Mo. 357; *Fried v. Talcott*, 57 L. Ed. (U. S.)——.

Again it is contended by counsel for appellant that, they do not seek to bind Weinberg, but only to bind the sureties on his appeal bond Zachariah and Harris. I submit that in this attempt, they fall squarely in the case of *Goyer Co.* against *Jones* reported in the 79th Miss. at page 255. The only difference in the two cases is that, in the *Goyer Co. case*, Jones had secured his discharge; in this case the only reason the discharge was not granted prior to the judgment was because Kohn-Weil & Co. had filed objections thereto. See the record where it is agreed that "Immediately after a petition for a discharge had been filed, Kohn-Weil & Co. filed objections to the discharge, and that proof had been taken on the objections filed against the discharge and submitted to the referee in bankruptcy, to whom the petition for discharge had

been referred, and that he had passed upon the same and certified his finding to H. C. Niles, judge, and recommended the granting of the discharge prior to the trial of this cause in the circuit court. It is further agreed that immediately after the rendition of the judgment in the circuit court, Kohn-Weil & Co. withdrew their objections to the discharge of Weinberg."

The chancellor held that appellant had no claim against Weinberg, therefore it could have none against his sureties on the appeal bond; that its acts in filing objections to the discharge and withdrawing them immediately upon recovering a judgment was a fraud upon Weinberg and done only for the purpose of gaining an advantage not countenanced by law or in equity. At least, that was the effect of his holding.

We took the proper proceeding in filing a petition in the state court to stay the suit. *Allen v. Montgomery*, 43 Miss. 102; *Hill v. Harding*, 27 L. Ed. (U. S.) 493. I respectfully submit that this case should be affirmed.

STEVENS, J., delivered the opinion of the court.

The appeal in this case is from a decree of the chancery court of Sunflower county canceling a judgment rendered by the circuit court in favor of appellant and against Abe Weinberg, principal, and Joe Zachariah and I. Harris, sureties, and perpetually enjoining appellees from enforcing the said judgment. Appellant, a corporation, recovered judgment in the justice of the peace court against Abe Weinberg for the sum of one hundred and eighty-two dollars and eighty-five cents. Weinberg appealed to the circuit court with Joe Zachariah and I. Harris as sureties on his appeal bond. The appeal bond was conditioned according to the statute "for the payment of such judgment as the circuit court may render against him." Thereafter Weinberg filed a voluntary petition in bankruptcy, was duly adjudicated a bankrupt, a trustee appointed for his estate, and his estate was there-

upon administered in accordance with the bankruptcy law. Weinberg, within forty days after the adjudication in bankruptcy, filed his petition for discharge, to which appellant filed objections, and the question of Weinberg's discharge was referred to the referee for proof and his report. When Weinberg's appeal came up for trial in the circuit court, and while his application for discharge was pending, he filed a petition in the circuit court, suggesting his bankruptcy, advising the court of his petition for discharge, and asking that all proceedings in his appeal case be stayed until his petition for discharge was acted upon. In response to this application appellant produced an order granted by the district judge sitting in bankruptcy, authorizing appellant as plaintiff to proceed to judgment in that suit. The circuit court thereupon overruled the application to stay the proceedings, and the case proceeded to trial and judgment, was rendered, in favor of appellant and against Weinberg as principal and Zachariah and Harris as sureties on the appeal bond, for the full amount sued for. Execution was then issued on this judgment against the sureties, and was in the hands of the sheriff when Weinberg and his said sureties, appellees herein, presented their bill in the chancery court, reciting the facts above stated, averring, further, that since the rendition of the judgment by the circuit court Weinberg had been discharged from bankruptcy, and praying for the cancellation of the judgment as to all the judgment debtors and for an injunction against the execution of the same. Appellant answered the bill, denying the allegation that the judgment was void, or that Weinberg had been discharged, and denying the right of complainants to any of the relief sought by the bill. Thereafter appellant filed a motion to dissolve the injunction, and the cause was heard upon bill, answer, and agreed statement of facts. The agreed statement of facts discloses that the discharge was granted after the trial of the appeal in the circuit court and a month or so after the bill of complaint in this cause was filed.

The circuit court had jurisdiction of the parties and the subject-matter, and the judgment herein enjoined was not void. Conceding that suits against a bankrupt may be and should ordinarily be stayed after adjudication and before the discharge is granted, the record discloses express authority, granted appellant by the bankruptcy court, to proceed to judgment in the state court, and the rendition of judgment based upon a claim that was admittedly due an owing. When the justice court rendered its judgment, there was no adjudication of Weinberg as a bankrupt, and the express obligation of the sureties was to pay such judgment as the circuit court should render. When the circuit court called the case for trial Weinberg had not been discharged, and was therefore in no position to plead his discharge in bar of the demand sued on. It seems that he had no defense to the suit. The judgment was rendered by the state court with full approval of the bankruptcy court, and the sureties have no right to complain. The appeal from the justice court was a voluntary act of Weinberg and the obligation imposed by the appeal bond was a voluntary undertaking of the sureties. If Weinberg had no defense to the judgment rendered by the justice of the peace, the appeal was without merit, and no equity of the parties is invaded and no vested right taken away by the trial of the case on appeal and the rendition of the judgment in question. It is permissible, and not infrequent, for special judgments to be rendered by a state court for the express purpose of fixing liability against sureties. *Loveland on Bankruptcy*, vol. 1, p. 160; *Hill v. Harding*, 130 U. S. 699, 9 Sup. Ct. 725, 32 L. Ed. 1083. This case is differentiated from the case of *Goyer v. Jones*, 79 Miss. 253, 30 So. 651, where the contingency upon which the liability of the sureties rested did not arise. In the *Goyer case* no valid judgment was or could be rendered against the principal, and therefore under the express condition and agreement of the appeal bond no liability was or could be fixed against the

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sureties. In the instant case judgment was in fact rendered against the principal and a judgment based upon a debt admittedly due and owing.

The record discloses, further, that the *status* of the parties had not been changed after the rendition of the judgment by the circuit court and before the filing of the bill of complaint in this suit. If there was any error in the circuit court proceedings, any party aggrieved had the right of appeal. The sureties, however, are not relieved by the subsequent discharge. 27 A. & E. Encl. of Law (2d Ed.) 493; *Whereatt v. Ellis*, 103 Wis. 348, 79 N. W. 416, 74 Am. St. Rep. 865; Loveland on Bankruptcy, vol. 2, pp. 1389-1891. Inasmuch as the decree of the court below should have been in favor of appellant, the decree of the chancery court is reversed, and the bill dismissed.

Reversed.

NEW ORLEANS, M. & C. R. Co. v. STATE.

[70 South, 355.]

1. APPEAL AND ERROR. *Grounds of error. Waiver. Railroads. Privilege tax. Right to impose. Assessments. Classification. Commerce. Burden upon. Constitutional law. Legislature. Delegation of power. Invalidity of statutes. Due process of law. Equal protection of law.*

On appeal from an order overruling a demurrer, the grounds not argued will be considered waived.

2. RAILROADS. *Privilege tax. Right to impose.*

The tax imposed by chapter 102, Laws 1912, is a privilege tax and not an *ad valorem* tax and may be imposed upon railroads doing a purely intra-state business.

3. RAILROADS. *Assessments. Classification. Commission.*

The railroad commission sits as a court of inferior jurisdiction. Its judgments in fixing assessments for *ad valorem* taxes and in

classifying the several railroads for privilege tax purposes are binding upon both the state authorities and the railroad companies assessed, unless an appeal is prosecuted in the method prescribed by statute.

4. **COMMERCE.** *Interstate commerce. Burden upon.*

Laws 1912, chapter 102, increasing privilege taxes on railroads, and fixing the privilege tax to be imposed on all railroads is not in violation of the Constitution of the United States, Act 1, section 8, as imposing a tax or burden upon interstate commerce by assessing taxes according to interstate earnings.

5. **CONSTITUTIONAL LAW.** *Legislature. Delegation of power.*

While the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend, and so it may delegate to a railroad commission, the right to determine questions of fact; such as, whether a railroad falls within a given class for purpose of license taxes under Laws 1912, chapter 102.

6. **CONSTITUTIONAL LAW.** *Invalidity of statutes.*

One who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality. A railroad company classified for the lowest privilege tax imposed by Laws 1912, chapter 102, cannot complain that the act authorized the railroad commission to consider the "gross earnings" of each railroad in classifying it for taxation and thus worked a burden upon interstate commerce, since such "gross earnings" are construed to refer only to intrastate business.

7. **CONSTITUTIONAL LAW.** *Railroads. Taxation. Due process of law.*

The state having power to impose license taxes, and Laws 1912, chapter 102, not working any burden on interstate commerce, such act cannot be held invalid under Constitution, U. S. Amend. 14, as depriving railroads, which also run into other states, of their property without due process of law, or denying them equal protection of the laws, on the theory that in classifying such roads for taxation their interstate earnings can be considered.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Suit by state of Mississippi against the New Orleans, Mobile & Chicago Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court. *Flowers, Brown, Davis & Chambers*, for appellant.

George H. Ethridge, Assistant Attorney-General, for the state.

STEVENS, J., delivered the opinion of the court.

The state, through Ross A. Collins, Attorney-General, and D. L. Thompson, Auditor of Public Accounts, brought this action of debt against appellant, a railroad company incorporated under the laws of Mississippi and operating a line of railroad from Mobile in the state of Alabama, through Mississippi, and to Middleton, Tennessee, to recover the privilege taxes for the year 1914, imposed by chapter 102, Laws of 1912, amending section 3856, ch. 114, of the Code of 1906. Chapter 102 of the Laws of 1912 is as follows:

“An act to increase the privilege taxes on railroads by amending section 3856 of chapter 114 of the Code of 1906.

“Amending Code as to Privilege Tax on Railroads.

“Section 1. Be it enacted by the legislature of the state of Mississippi, that section 3856 of chapter 114 of the Code of 1906, levying privilege taxes on railroads be, and the same is hereby amended so that for the purpose of levying a privilege tax on railroads such railroads are divided into five classes, first, second, third, narrow gauge and levee district, and privilege taxes are levied on them as follows:

“On each railroad of the first class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), forty-five dollars.

“On each railroad of the second class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), twenty-five dollars.

“On each railroad of the third class, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), ten dollars.

"On each narrow gauge railroad, per mile (mileage within the levee district or districts on which levee taxes are paid, excepted), two dollars and fifty cents.

"On that part of each levee district railroad of the first class, within the levee district or districts, on which levee taxes are paid, per mile, twenty dollars.

"On that part of each railroad of the second class, within the levee district or districts, on which levee taxes are paid, per mile, fifteen dollars.

"On that part of each railroad of the third class within the levee district or districts, on which levee taxes are paid, per mile, seven dollars and fifty cents.

"On that part of each narrow gauge railroad within the levee district or districts, on which levee taxes are paid, per mile, two dollars and fifty cents.

"Sec. 2. The Railroad Commission shall, annually, on or before the first Monday in August, classify the several railroads according to their charter, and the gross earnings of each, and the privilege taxes thereon shall be paid on or before the first day of December, and the findings of the said Railroad Commission shall be certified to the auditor of public accounts and the chancery clerk of the county through which each road or roads run; and any person or persons, natural or artificial, who shall exercise any of the privileges taxed herein, without first paying the tax and procuring the tax or license, as required by law, shall be subjected to the pains and penalties imposed by section 3894 of the Code of 1906, and to such other pains and penalties as may be otherwise provided by law.

"Sec. 3. That this act take effect and be in force from and after its passage.

"Approved March 16, 1912."

Appellant was classified by the Railroad Commission as being in the third class and liable for the privilege tax of ten dollars per mile, and, declining to pay this tax, this suit was instituted in the circuit court of Forrest county for the recovery thereof. The declaration charges

that appellant does a general intrastate business in the state of Mississippi, and operates a railroad in and through the counties of Green, Jasper, Jones, Forest, Perry, Newton, Neshoba, Winston, Choctaw, Webster, Chickasaw, Pontotoc, Union, and Tippah, and through various municipalities, which are detailed; that the Mississippi Railroad Commission had classified the railroads in the state in accordance with their charters and the gross earnings on intrastate business in the state, and that appellant had been classified as being a third class railroad within the meaning of said statute, and, by virtue of the act in question, was due to the state of Mississippi the sum of ten dollars per mile, or an aggregate sum of three thousand, five hundred and eighty-five dollars and fifty cents; that in addition, each of the municipalities mentioned in the declaration has a right under the laws of the state to levy a privilege tax not to exceed fifty per cent of the state tax, or five dollars per mile for the mileage within its corporate limits; that a statement of the municipalities and the amounts and their rates on the number of miles within the boundaries of each is attached to the declaration as Exhibit A, and made a part thereof, and that the defendant was due the several municipalities the amount shown in the exhibit; that the privilege tax in question is required to be paid to the auditor of public accounts on or before the first day in December of each year; that the tax is due and unpaid; that demand had been made, and the defendant refused to pay. Exhibit A tabulates the counties, and gives the mileage and total tax due on mileage in each county, and likewise shows a total amount claimed by municipalities of three hundred and one dollars and fifty cents, making a grand total of three thousand, nine hundred and eighty-nine dollars.

A demurrer was interposed to the declaration, attacking the constitutionality of the statute imposing this tax and submitting: First, that the act in question is void because in contravention of article 1, section 8, of

the federal Constitution, in that it attempts to interpose a tax upon interstate commerce, and is an attempt to regulate the interstate commerce carried on by the defendant; second, that the act requires the Railroad Commission to classify railroads according to their gross earnings, and imposes a larger or smaller tax according to the amount of gross earnings as compared with the gross earnings of other carriers, and hence imposes a burden upon the interstate commerce of the defendant; third, that the statute contravenes the Fourteenth Amendment to the federal Constitution, in that it deprives the defendant of its property without due process of law and denies to it the equal protection of the law; and, fourth, that the act contravenes section 112 of the Constitution of the state of Mississippi, providing that taxation shall be uniform and equal throughout the state. The demurrer was overruled. The defendant declined to plead further, and judgment final was entered for the full demand sued for. From this judgment, appellant prosecutes an appeal, assigning as error the refusal of the court to sustain the demurrer and to hold the statute void and unconstitutional for the reasons submitted by the several grounds of the demurrer.

The assignment of errors submits that the court erred in holding the act of 1912 constitutional, and does not specify the particular grounds relied on in the court below. Counsel for appellant, in their brief, do not argue the fourth ground of the demurrer; and we take it they concede that section 112 of our state Constitution has no application to the tax here attempted to be imposed and is not really involved in this case.

Chapter 102 of the Laws of 1912 is a re-enactment, with slight variation, of a statute incorporated as section 3379 of the Code of 1892. The contention was made in *Railroad Co. v. Adams*, 85 Miss. 772, 38 So. 348, that this was an *ad valorem* and not a privilege tax; and in response, the court said:

"We do not concur in this, but hold that the tax sought to be collected is a privilege tax proper."

It is contended by appellant that the statute is obnoxious to and contravenes the federal Constitution, in that it imposes a burden on the interstate commerce carried on by appellant as an interstate railroad; that the statute embraces all railroads in Mississippi, both interstate and intrastate, without excepting from its operation the interstate business carried on by interstate railroads. It is further contended that the act imposes a burden on interstate commerce because of the provision directing the Railroad Commission to classify the several railroads according to the "gross earnings of each," without exempting or excepting the earnings derived from interstate commerce and business done for the United States government. It was the purpose of the statute in question to impose on railroads a privilege tax for doing business within the confines of our state—for doing a purely intrastate business. The whole act and the chapter in which it appears in our Code show a general scheme for imposing an excise or privilege tax on various occupations, businesses, and professions within the confines of our state, to raise revenues in support of our state government, and the act assumes, of course, that the occupation or business taxed is one to be done or carried on within the state. The right of the state to impose a privilege tax on railroads for doing a purely intrastate business is not controverted. Railroad companies by right of eminent domain appropriate and occupy hallowed and valuable territory, and otherwise enjoy special privileges and franchises. Individuals and corporations other than railroads are subjected to similar taxation. For the doing of an intrastate business, therefore, there can be and is no complaint by appellant. It is chartered under the laws of our state, and admittedly is doing both an intrastate and an interstate business. This statute, which has been on our books since 1892, in the first place levies a tax upon the privilege of doing a railroad business in Mississippi, and then

for the purpose of measuring that tax it prescribes and fixes a maximum and a minimum tax per mile on a standard gauge railroads, and, as a further means of distributing the burden in an equitable manner, empowers and directs the State Railroad Commission to classify standard gauge railroads into first, second, and third classes "according to their charter and the gross earnings of each." While the act itself levies the tax and provides that standard gauge railroads outside of the levee districts shall be divided into three classes, it yet remains that the Railroad Commission must classify before the levy is complete.

"If it be conceded that the act levies a tax, it still remains true that something more was necessary, to wit, the classification referred to." *Railroad Co. v. Adams*, 83 Miss. 320, 36 So. 145.

The members of the Railroad Commission are our state railroad assessors. Section 4384, Code of 1906, provides that "The members of the Railroad Commission are constituted State Railroad Assessors," and as such are charged with the duty of assessing railroads, not only for *ad valorem* taxes, but for privilege taxes. Section 4382, Code of 1906, requires each railroad company in Mississippi to file schedules with the Commission, showing, among other things—

"the gross amount of receipts the year preceding from passengers and freights separately, and the proportion thereof earned within and from this state."

It may be that the directions given the Commission by chapter 102, Laws of 1912, for classifying railroads for privilege tax purposes, are very general and, to some extent, indefinite. They are, however, given a general rule to go by, viz., to classify the several railroads according to their charter and the gross earnings of each. In construing these general provisions of the statute we must keep in view the general object to be accomplished and the character of the tribunal or Commission invested with the authority to classify. This Commission, as

stated, has exclusive jurisdiction in the matter of the assessment of all railroads for taxes, and has general supervision of all carriers in our state and sits as a court of inferior jurisdiction. Its judgments in fixing assessments for *ad valorem* taxes and in classifying the several railroads for privilege tax purposes are binding upon both the state authorities and the railroad companies assessed, unless, of course, an appeal is prosecuted in the method prescribed by statute. This was distinctly held by our court in *Railroad Co. v. Adams*, 85 Miss. 772, 38 So. 348, when the revenue agent attempted to backclassify certain railroads. The court, through Cox, Special Justice, says:

“The Commission classified them as railroads of the third class, and of the first, second, and third classes, respectively, saying nothing as to charter exemptions. This classification, in each case, was a judicial act. Everything was concluded by it which was comprehended or involved in it. It amounted to an adjudication that these roads were not liable for the years in question to the privilege tax of ten dollars per mile as railroads claiming exemption from state supervision. This judgment is final and conclusive, and cannot now be brought in question. *Railroad Company v. Adams*, 77 Miss. 778, 25 So. 355; *Railroad Company v. Adams*, 81 Miss. 105, 32 So. 937.”

This holding was reaffirmed by us in the very recent case of *Western Union Telegraph Co. v. Kennedy*, 69 So. 674, declaring that the judgment of the Railroad Commission which is valid on its face but without justification in fact, could not be reviewed except by *certiorari* to the circuit court, the method of appeal provided by law. So in the instant case appellant cannot complain of any matter of fact that induced or led the Commission to place appellant in the classification or class to which it has been assigned under the act in review, unless it is shown that the entire act is unconstitutional and void *ab initio*; in other words, on all matters of fact the order of the Railroad Commission is binding on all parties.

There is another and further sufficient reason why appellant cannot complain of this classification in the instant case. It was assigned to the third or lowest class, and thereby ordered to pay the minimum tax per mile provided by the statute. Can it be said, therefore, that the whole act is unconstitutional and void, and is appellant in position to so contend? In attempting to square the act in question with the Constitution of the United States, we must of course look to the act itself, the context or subject-matter dealt with, and the general purpose attempted to be accomplished. Taking the act by the four corners and keeping in view the object to be attained, we find this statute a part of the general scheme for levying privilege taxes on the several and various kinds of business, trades, and professions done, practiced and carried on in Mississippi. The state in its sovereign capacity is exacting from those who do business and practice and enjoy their several trades and professions a tax as a condition precedent to the right of exercising the privileges. The subject of the tax in each case is the party or corporation doing business, plying his trade, or practicing his profession in Mississippi, and not, of course, in a foreign state or country. The business sought to be taxed is, in each instance, the business done within the confines of our own state. In the case of appellant the tax sought to be imposed was certainly intended to be upon the business enjoyed by it in Mississippi and as a domestic corporation. Every intelligent man knows, and the legislature in enacting this law well knew, that a tax could not be imposed by our legislative department on interstate commerce, and that no law could be passed burdening interstate commerce or seriously embarrassing railroads in doing such business, or in doing business for the United States government. It is therefore unreasonable to assume that the legislature had any intention of burdening or embarrassing interstate commerce. The act, as stated, appears in the chapter dealing with privilege taxes, and not in connection with any statutory provisions providing the

terms and conditions upon which foreign corporations may do business in our commonwealth. There is no effort here to impose hard conditions or charge fees for admitting foreign corporations or allowing railroads to do an interstate business. The subject-matter dealt with is entirely different. There is here not the slightest suggestion that the statute is attempting to discriminate against, or to impose any unreasonable regulations upon foreign corporations or upon railroads traversing our territory. This is not a tax upon any agent or agency of any interstate railroad, or upon any means employed by such railroad company to get business, as was the fact in many of the cases decided by the United States supreme court and relied on by appellant. We are not called upon to take issue with any of the pronouncements of the United States supreme court in any of the cases cited by counsel for appellant. This is not a tax on the income or gross earnings of any railroad. There is no effort here to tax the earnings of appellant or any other railroad company. The tax for the privilege of doing business in Mississippi is upon the mileage of railroads in Mississippi, and not only is this true, but the legislature, in an apparent effort to be reasonable, has fixed the maximum rate per mile, and consequently a maximum amount beyond which the tax in no case could run. In this regard it falls within the principle announced by the supreme court of the United States in *Baltic Mining Co. v. Massachusetts*, 231 U. S. 68, 34 Sup. Ct. 15, 58 L. Ed. 127, as follows:

“So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state’s jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock it is used only as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable.”

The *Baltic Mining Company Case* is differentiated from the case at bar, but the principle announced is applicable to the instant case. A railroad company might own a transcontinental railroad running through Mississippi and earning annually millions of dollars, yet this fact could, in no way, under any view of the case, influence the Commission in fixing upon such road a tax in excess of forty-five dollars per mile, prescribed to be paid by railroads of the first class.

The direction to the Railroad Commission to consider the gross earnings of the railroads is only a part of the general directions given. They are also directed to consider the charter of the several railroad companies. We are not called upon in this case to define every element that should properly be considered by the Railroad Commission in determining the particular class to which any road should be assigned, but we do say that the act gives evidence of a general rule whereby the Commission should consider the charter rights and privileges of each company. It was the purpose of the legislature to graduate the taxes according to the business and rights enjoyed. In determining the class the legislature thought it material for the Commission to look to the general charter of the company and the extent of the rights and franchises therein conferred upon the company. Is the company in any particular case one chartered to operate a grand trunk railroad or a line of a few miles? Is it one equipped for and capable of doing a large business? In other words, a charter and charter privileges give evidence of the volume of business prepared to be done, and actually being done, by any railroad in Mississippi, and to some extent define its prosperity.

We apprehend that counsel for appellant place too great stress on the words "gross earnings." It is our judgment that the words as here employed simply mean the earnings of the road. The word "gross" is used more in contradistinction to the word "net," and the very fact that the legislature employed the words "gross earn-

ings" evinces a purpose to establish a measure of taxation that is easy of determination. If the legislature had employed the words "net earnings," then much difficulty and great confusion would result in determining the net earnings of any railroad company on its intrastate business. It would be a thing almost impossible of ascertainment. A railroad doing an interstate business would employ, to a large measure, interstate trains and equipment for doing also a purely local business, and a prorating of this expense would be at best a mere matter of estimate. The contention that the words "gross earnings" evidence a purpose to burden interstate commerce might as well be made in reference to the mileage and charter of an interstate railroad. Why not contend that an interstate railroad company is required to maintain a more substantial and costly roadbed, and also that the charter of a railroad company doing an interstate business in Mississippi discloses valuable rights and franchises, granted, perhaps, by a foreign state and necessary for the doing of an interstate business? But no such contention is advanced in this case. If we construe the act, however, as even authorizing the Railroad Commission to take account of the earnings derived from interstate business and business done for the United States government, we might as well also declare that the Commission can take account of the aggregate rights and franchises conferred upon the company by the sovereign of a foreign state. The legislature, however, could not have intended any such absurd result. Any interpretation of the statute must take into account the fact that the legislature in giving these directions is not itself directly imposing a tax upon the earnings of the railroad, but is investing an inferior tribunal or governmental functionary with the general authority to classify all railroads in five classes. This tribunal stands between the parties with authority to fix the classification and thereby equitably adjust the rights of all parties. In fixing the classification any railroad has the right to be heard, to offer evidence, reserve objections

to any adverse ruling, and to have the proceedings and judgment of this tribunal reviewed by the circuit court through the proper writ of *certiorari*. Authority of this kind has frequently been committed to governmental tribunals. The Interstate Commerce Commission has been given authority to make reasonable rates and to administer the law against discrimination. *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; *I. C. C. v. Chicago, R. I. & P. R. R. Co.*, 218 U. S. 88, 30 Sup. Ct. 651, 54 L. Ed. 946.

"The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must, therefore be a subject of inquiry and determination outside of the halls of legislation." *Marshall Field & Co. v. Clark*, 143 U. S. 694, 12 Sup. Ct. 505, 36 L. Ed. 310.

To the same effect is the holding in *United States v. Grimaud*, 220 U. S. 506, 31 Sup. Ct. 480, 55 L. Ed. 563. It was said, also, in the case of *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 34 Sup. Ct. 359, 58 L. Ed. 713:

"From this it necessarily results that it was competent for the legislature to lay down a general rule, and then establish an administrative tribunal with authority to fix the precise width or thickness of pillar that will suit the necessities of the particular situation and constitute a compliance with the general rule. . . . Administrative bodies with authority not essentially different are a recognized governmental institution. Commissions for the regulation of public service corporations are a familiar instance."

It is interesting and very persuasive to note in this connection that the declaration in this case avers, and

the demurrer admits, that the Mississippi Railroad Commission has actually taken into consideration only the earnings on intrastate business, and it is conceded by all parties that this simultaneous construction was placed upon the statute by the Commission and all parties in interest, and, so interpreted, the law was complied with from 1892 until recently. As a matter of fact, therefore, the Commission has not considered the gross earnings of any railroad company in determining its classification. There has never therefore been any necessity for any railroad to reserve exceptions to any finding of the Commission classifying the roads, based upon the complaint that interstate commerce has been burdened or embarrassed. The Commission saw fit to construe the statute within the narrow limits evidently intended by the legislature; and so it is, in the instant case, that appellant has not been injured by the very provision here complained of. It, therefore, well comes within the rule, announced and reiterated by both this court and the United States supreme court, that to entitle one to plead the unconstitutionality of any particular statute such party must be damaged by the alleged obnoxious provisions.

“The case in this aspect falls within the established rule that ‘one who would strike down a state statute as violative of the federal Constitution must bring himself, by proper averments and showing, within the class as to whom the act thus attacked is unconstitutional. He must show that the alleged unconstitutional feature of the law injures him, and so operates as to deprive him of rights protected by the federal Constitution.’ ” *Standard Stock Food Co. v. Wright*, 225 U. S. 540, 32 Sup. Ct. 784, 56 L. Ed. 1197.

See, also, *Southern Railroad Co. v. King*, 217 U. S. 524, 30 Sup. Ct. 594, 54 L. Ed. 868, and other authorities cited in the *Standard Stock Food Company Case*. This declaration is reannounced in the *Plymouth Coal Company Case*, *supra*. The objection here urged in no event could apply to every provision of this statute. Certainly a

railroad company operating a narrow gauge railroad could not be heard to say that the entire act is unconstitutional and void. One must be hurt before he complains.

"One who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality, or obtain a decision as to its validity on the ground that it impairs the rights of others." 6 R. C. L. pp. 89, 90.

Appellant has not brought itself within the rule above announced. The alleged unconstitutional feature complained of has not injured it, and, so long as the Railroad Commission adheres to its construction of the statute, will never hurt either appellant or any other railroad in Mississippi. This construction, as stated, has been placed upon the act by the Commission and the revenue officers of the state, and the construction they place upon it is very persuasive with this court.

"The rule is generally accepted that when a statute is broad enough to cover matters without the state as well as within, and as applied to matters without the state it would be unconstitutional, the court may restrict the application to matters within the jurisdiction of the state, unless the statute clearly indicates a different intent." 6 R. C. L. p. 80.

We cannot give to general provisions of any statute a meaning that would lead to absurdity, or that would convict the legislature of attempting to deal with a subject clearly beyond its jurisdiction. The spirit and reason of the law certainly prevail over the strict letter. Furthermore, there is room for applying the words "gross earnings" in this statute to the gross earnings derived from the intrastate business, and not to the gross earnings of the entire system of an interstate railroad. This distinction is recognized in section 4382, Code of 1906, requiring railroad companies to file schedules with the Commission. The United States supreme court well says in the case of *Petri v. Bank*, 142 U. S. 650, 12 Sup. Ct. 326, 35 L. Ed. 1146:

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"It is the duty of the court to ascertain the meaning of the legislature from the words used and the subject-matter to which the statute relates, and to restrain its operation within narrower limits than . . . the literal meaning of its language would extend to cases which the legislature never intended to include in it."

This principle of law is strongly reaffirmed and reannounced in *United States v. American Bell Telephone Co.*, 159 U. S. 548, 16 Sup. Ct. 69, 40 L. Ed. 255; *McKee v. United States*, 164 U. S. 287, 17 Sup. Ct. 92, 41 L. Ed. 439; *St. L. & S. W. R. R. Co. v. Arkansas*, 235 U. S. 350, 35 Sup. Ct. 99, 59 L. Ed. 265.

"It is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, it is the duty of the courts to adopt that construction which will uphold its validity; there being a strong presumption that the lawmaking body has intended to act within, and not in excess of, its constitutional authority." *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 546, 34 Sup. Ct. 363, 58 L. Ed. 720.

Our own court in the case of *Kennington v. Hemingway*, 101 Miss. 259, 57 So. 809, 39 L. R. A. (N. S.) 541, Ann. Cas. 1914B, 392, speaking through SMITH, J., well says:

"Human language is not a perfect vehicle for conveying thought, and it frequently happens that words used have a broader or narrower meaning than that intended by the person using them. One of the maxims of the common law, therefore, is '*verba intentioni debent inservire*.' (Words are to be governed by the intention.) As was said by this court in *Board of Education v. Railroad Co.*, 72 Miss. 236, 16 So. 489, *supra*; 'It is familiar learning that, in the construction of statutes, courts chiefly desire to reach and know the real intention of the framers of the law, and, reaching and knowing it, then to adopt that interpretation which will meet the real meaning of the legislature, though such interpretation may be beyond or

within, wider or narrower than, the mere letter of the enactment.' "

We hold that the tax here sought to be defeated is a privilege or occupation tax; that it is imposed for the privilege of doing an intrastate business; that the Railroad Commission is the governmental tribunal empowered under a general rule to classify railroads,⁴ and that this general rule is merely a guide whereby the Commissioner determines the classification. We further hold that the action of the Commission in classifying the railroad is binding upon both the state and the road classified; and, looking to the whole act and subject-matter dealt with, the legislature did not intend to hamper, burden, or embarrass interstate commerce, and the act in question ought not to be subjected to such criticism. If, then, the tax is an occupation tax and its exact amount determined by the classification and mileage, and if, further, this classification is unaffected by earnings derived from interstate commerce or business done for the government, and the Commission and revenue officers of the state have so construed it, it is difficult to understand why we should be called upon to condemn the act as unconstitutional and void and inflict upon it the death penalty when the federal Constitution is not trespassed upon and the rights of no one invaded.

Affirmed.

SMITH, C. J. (dissenting). The three cardinal rules for construing statutes are: First, the intent of the legislature expressed in the words it has used must govern; second, words in common use are to be given their ordinary and popular meaning; and, third, the legislative intent must—

“be determined from a general view of the whole act, with reference to the subject-matter to which it applies and the particular topic under which the language in question is used.”

Another fundamental rule of the common law which it is the imperative duty of the courts to obey, is that when, by an application of the three rules above set out, the meaning of a statute is plain and unambiguous, it is not permissible to resort to any other subsidiary rules of construction, even though by so doing a different meaning can be given the statute; otherwise no lawyer would be safe in advising upon the meaning of the statute, nor would any citizen be safe in acting upon it.

The words of the statute here in question are as plain and unambiguous as it is possible for the English language to be, and provided that:

“The Railroad Commission shall . . . classify the several railroads according to . . . the gross earnings of each,”

—but is interpreted by my Associates as if it read as follows:

“The railroad commission shall classify the several railroads according to . . . the gross earnings of each derived from business transacted wholly within this state.”

Such interpretation is, in my judgment, the making of a new law, not enforcing an old one; and such is not a part of the duty of the courts. That the words, “gross earnings,” possibly mean no more than would have been implied by the use of the word “earnings” alone is immaterial; for the use of either implies the earnings of the road derived from every source. The absence of the word “gross” might leave room for a doubt as to whether gross or net earnings were intended, but could have no other effect.

General words of a statute may be given a limited meaning only when it is manifest from the whole statute that the legislature so intended. That such was the legislative intent may be inferred when not to limit them leads to oppression, injustice, or to an absurd consequence; but this cannot be done solely for the purpose of bringing the statute within the constitutional powers

of the legislature. If such a rule of construction exists, most of the statutes which have been heretofore declared void, because as written they affected both intrastate and interstate commerce, could have been upheld and restricted to intrastate commerce alone. That a statute covering by its language a matter both within and without the constitutional powers of the legislature can be limited by construction so as to cover only such matters as the legislature is empowered to deal with was expressly denied by the supreme court of the United States in *U. S. v. Reese*, 92 U. S. 214, 23 L. Ed. 563. In that case the court had under consideration a statute enacted by Congress with reference to the holding of elections which, by its general language, regulated matters pertaining to elections both within and without the constitutional powers of Congress. The court was requested to uphold the statute by limiting and applying it solely to such matters as were within the constitutional powers of Congress. This it declined to do, and, among other things, said.

"We are therefore directly called upon to decide whether a penal statute, enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limita-

tion into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the courts; but if it steps outside of its constitutional limitation and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the states and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

If a state has the power so to do, the taking by it into consideration of the interstate earnings of railroads in classifying them for the purpose of imposing privilege taxes upon them is not necessarily either oppressive or unjust, and is certainly not absurd; and, in my judgment, so to do was exactly what the legislature intended in passing the statute here in question, on the mistaken theory, of course, that it was acting within its constitutional powers. That the Railroad Commission may have limited the statute so as to bring it within the constitutional powers of the legislature is immaterial for, as I have hereinbefore pointed out, it is not permissible so to do.

My views with reference to the matter here under consideration will be found further expressed in the opinion of GRUBB, J., in the case of *Illinois Central Railroad Co. v. Mississippi Railroad Commission*, 227 Fed.—, recently decided by the federal district court for the southern dis-

trict of Mississippi, wherein the court had under consideration the statute here involved, and held that it violated the interstate commerce clause of the federal Constitution.

I am of the opinion, therefore, that the judgment of the court below should be reversed, and the cause dismissed.

BEDDINGFIELD ET AL. v. NEW ORLEANS & N. E. R. Co.

[70 South. 402.]

1. *RELEASE. Limited release. Effect. Master and servant. Injuries to servant. Pleading. Declaration. Cure by verdict. Statute of jeofails. Demurrer. Necessity to assign grounds. Statute.*

Where the release of an injured servant to the master, was not a general release, but a limited one, covering only such damages as resulted to him from the bruising of his shoulder, such a release did not cover other injuries which were unknown to the parties at the time the release was executed.

2. *MASTER AND SERVANT. Injuries to servant. Pleading. Declaration.*

Where in a suit by the heirs of a servant for injuries caused by being struck by the head of a hammer, the declaration alleged that the master "negligently and carelessly furnished the said Joe Smith (plaintiff's fellow servant, who was striking a chisel which plaintiff's intestate held), with a sledge hammer to be used in cutting off the top of bolts, the handle of which hammer was defective in this, that it was shivered and shattered, which caused said sledge hammer to be and was loose on the handle." Such a declaration was not defective in not alleging that the hammer was loose on the handle or that the handle was shivered and shattered when furnished for use by the master.

3. *PLEADING. Declaration. Cure by verdict. Statute of jeofails.*

While it is true that in an action by the heirs for the death of a servant, the allegation in the declaration that plaintiffs were

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the heirs, and only heirs at law of decedent, was a mere conclusion of law, such defect was cured by verdict under Code 1906, section 808, regulating what defects in pleading are cured by verdict.

4. *PLEADING. Demurrer. Necessity to assign grounds. Statute.*

Where a declaration was defective in such a way as to be curable under Code 1906, section 808, by verdict, such defect could be availed of by demurrer only when specifically assigned as a ground thereof, under section 754, which provides that when a demurrer shall be interposed, the court shall not regard any defect in the pleadings, except such as shall be assigned for causes of demurrer, unless something so essential to the action or defense be omitted that judgment according to law and the right of the cause cannot be given.

APPEAL from the circuit court of Lauderdale county.

HON. J. L. BUCKLEY, Judge.

Suit by H. H. Beddingfield and another against the New Orleans Northeastern Railroad Company. From a judgment sustaining a demurrer to the replication, plaintiff appeals.

Appellants filed their declaration in the court below for damages caused by the death of their brother, W. H. Beddingfield, alleging in their declaration that they were his only heirs at law, and that their said brother was injured by the defective tools, implements, and appliances of the defendant negligently and carelessly furnished to him and his co-worker, Smith, alleging that on September 11, 1911, he and Smith had been ordered to cut off the top of a bolt under a car, and that he held a cold chisel against said bolt while Smith struck said chisel with a ten pound sledge hammer, and that said sledge hammer was so defective that it flew from the handle and struck Beddington in the shoulder, breaking the bones, causing degeneration of the spinal cord and nervous system and kidney trouble, which directly caused his death on May 13, 1913. The defense pleaded by the railroad company is a release signed by the injured man on October 20, 1911, which is as follows:

"In consideration of the sum of twenty three and fifteen one hundredths dollars, to me paid by the New Orleans

and North Eastern Railroad Company, the receipt whereof is hereby acknowledged, I hereby release and acquit said company of all claims by reason of injuries sustained by me at Meridian, Mississippi, on the 20th day of September A. D. 1911, by the head of a maul coming off and striking me on the shoulder blade, bruising same, the same being settlement in full of any and all claims I have against the said company, arising out of, or in any way connected with said injury or accident.”

Appellees filed a replication in which they alleged that the injuries complained of in the declaration were unknown both to the deceased and to the defendant at the time that the release was executed, and were not in contemplation of the parties at the time said release was signed. To this replication defendant filed a demurrer, which was sustained by the court, and the plaintiffs appeal.

Cochran & McCants, for appellants.

The sole question involved in this appeal is a proper construction of a release pleaded by the appellee.

It is alleged in plaintiff's declaration that “A hammer or maul, being negligently and carelessly handled by the appellee came off the handle thereof, shivered, shattered, and loose thereon as aforesad, and with great power and force struck the said W. H. Beddingfield on the scapular or shoulder blade of his right shoulder, and shattered the bone of said shoulder, and thereby then and there caused a degeneration of the spinal cord and nervous system, and a degeneration of the right kidney of the said W. H. Beddingfield, which directly caused his death on the 13th day of May, 1913.”

The appellee pleaded as a bar to a recovery the following release:

“In consideration of the the sum of twenty-three dollars and fifteen cents to me paid by the New Orleans & Northeastern Railroad Company, the receipt

whereof is hereby acknowledged, I hereby release and acquit said company of all claims by reason of injury sustained by me at Meridian, Mississippi, on the 20th day of September, A. D. 1911, by the head of the maul coming off and striking me on the shoulder blade, bruising same, the same being settlement in full of any and all claims I have against said company arising out of, or in any way connected with said injury or accident."

To the special plea setting up the above release, appellant replied:

"And the plaintiffs as to the special plea of the defendants by it above pleaded say that they, the plaintiffs, by reason of anything contained in said plea ought not to be barred from having their aforesaid action, because, they say, that the said W. H. Beddingfield, deceased, did not demand of the defendant the sum of twenty-three dollars and fifteen cents in settlement and satisfaction of the injury received as alleged in said declaration; and plaintiffs further say that the injuries alleged in said declaration were unknown both to the said W. H. Beddingfield, deceased, and to the defendant, at the time it is alleged said pretended release was executed, and were not in contemplation of the parties when said pretended settlement is alleged to have been made. Plaintiffs further say that said pretended release was made without any consideration, and is void, and this the plaintiffs are ready to verify."

To the above replication the appellee demurred, and the demurrer was sustained by the court, and the case dismissed. The court based its judgment solely upon the case of the *Alabama & Vicksburg Railway Company v. Henry Turnbull*, 71 Miss. 1029. The court will observe at a glance that that authority had no sort of application to the case before the court. The question involved in the Turnbull case was solely a question of misrepresentation and fraud, and no such question was before the court when we endeavored to get the court's construction of the release. The error became imbedded in the court's

mind, and all the artillery of all the authorities we could produce did not and could not dislodge the error.

The court will observe that the injuries complained of in the declaration were not the injuries released, although they were injuries received at the same time, by the negligence of the appellee, and which were not known and were not within the contemplation of the parties when the release was executed.

The plaintiff came to his death as a result of the injuries set forth in the declaration, and it is perfectly manifest that no sane person would receive, as the price of his life, the pitiful sum of twenty-three dollars and fifteen cents, and that no railroad corporation claiming to be decent and respectable would shock the conscience of all reasonable persons by paying such a price for a human life.

We desire in the outset to call the court's attention to the last five words of the release, as follows: "With said injury or accident." "Said injury" manifestly refers to the injury set out in a previous part of the release, and "injury" is used synonymously with "accident." "Or" in its ordinary and proper sense, is a disjunctive particle, and will be so construed unless there be something in the context to give it a different meaning." *Ox-sheer v. Watt*, 91 Texas 402.

"The word 'or' is often used to express an alternative of terms, definition or explanation of the same thing in different words. The word 'or' as used in a judgment against parties named therein 'or such of them as are now survivors,' was used to explain the meaning of the preceding clause, and the same persons were meant by both, and therefore a judgment was valid against the survivors." *Downs v. Allen*, 22 Fed. 805, 809.

There are two classes of releases, a general release and a limited release. A general release is rarely brought before a court for a construction; but in a limited release there is a particular recital or an enumeration of in-

juries, and a release of this character is frequently before the courts for construction.

The question usually involved in a limited release is whether or not the particular recitals restrict or control general clauses.

The release pleaded in the instant case is a limited release, and it is our contention that only the injuries recited or enumerated were released; the only injury released was a bruised shoulder, and that is quite different from an injury that shatters the shoulder blade, wrecks the nervous system, resulting in death. *Ramsden v. Hulton*, 2 Vs. Sr. 304-309; *Union Pacific R. R. Co. v. Artist*, 60 Fed. 365; *Jackson v. Stackhouse*, 1 Cow. 122, 126 and the cases cited; 2 Pars. Cont. 633, note.

In *Lumley v. Wabash R. Co.*, 76 Fed. 66, Judge LURTON, said: "We put our judgment upon the facts stated in this bill, to wit, that both parties supposed complainant had received injuries, the extent and character of which were considered and discussed with reference to the time which the injured party would probably lose in consequence thereof. In such a case, if a release is given specifically mentioning the particular injuries known and considered as the basis of settlement, general language following will be held not to include a particular injury then unknown to both parties of a character so serious as to clearly indicate that, if it had been known, the release would not have been signed. This jurisdiction is well known, and has frequently been applied in cases of release affecting property rights, both in courts of law and equity."

There was a particular recital of the injuries received in that particular release, and which concluded as follows:

"Now, therefore, in consideration of the premises, and of the payment to me of the aforesaid sum of seventy-five dollars, the receipt whereof I do hereby acknowledge, remise, quitclaim, and forever discharge the said Wabash Railroad Company, its leased and operated lines,

of and from all actions, suits, claims, reckonings, and demands for, on account of, or arising from injuries so as aforesaid received, and any, every, and all results hereafter flowing therefrom."

Language could scarcely frame a more sweeping release, yet the court held that the release did not include an injury which was unknown to the parties. *Lumley v. Wabash R. R. Co.*, *supra*; *Texas & Pacific R. R. Company v. George H. Dashiell*, 49 U. S. Supreme Court Report Law Ed.), 1150.

We think it is clear from the foregoing authorities that the only injury settled by the release was a bruised shoulder, and that the release pleaded is in no way a bar to a recovery for the injuries alleged in the declaration.

The point was not made in the court below, and we presume it will not be made here, that recovery could not be had for different injuries all caused by the same wrongful act of a party. *Lumley v. Wabash Ry. Co.*, *supra*, is a direct authority to the point that there is no obstacle to such recoveries.

We cite the court the following authorities approving the principles discussed by the authorities already cited: *Payler v. Homersham*, 4 M. & S. 423; *Solly v. Forbes*, 2 Brod. & B. 38, 6 E. C. L. 27; *Simons v. Johnson*, 3 B. & Ad. 180, 23 E. C. L. 48; *Boyes v. Bluck*, 13 C. B. 652, 76 E. C. L. 652; *Thorpe v. Thorpe*, 1 Ld. Raym. 235; *Upton v. Upton*, 1 Dowl. 400; *Ramsden v. Hylton*, 2 Ves. 304, 28 Eng. Rep. (Reprint) 196; *Knight v. Cole*, Show 150; *Lindo v. Lindo*, 1 Beav. 496; *Warwick v. Richardson*, 14 Sim. 281; *Cole v. Knight*, 3 Mod. 277; *Butcher v. Butcher*, 1 C. B. & P. N. R. 113; *Tex R. Co. v. Dashiell*, 198 U. S. 521, 25 S. Ct. 737, 49 U. S. (L. Ed.), 1150, 128 Fed. 23, 62 C. C. A. 531. But see *In re Russell*, 176 Fed. 253, 100 C. C. A. 77, holding that construction of release should be according to the intent of the parties to be gathered, if possible, from the instrument itself. *Tryon v. Hart*, 2 Conn. 120; *Lyman v. Clark*, 9 Mass. 238; *Reed*

v. *Tarbell*, 4 Met. 93, 101; *Rich v. Lord*, 18 Pick. 322; *Averill v. Lyman*, 18 Pick. 346; *Rice v. Woods*, 21 Pick. 30 and see *Hyde v. Bladwin*, 17 Pick. 303; *Wiggin v. Tudor*, 23 Pick. 444; *Scott v. Hay*, 90 Minn. 304, 97 N. W. 106; *Blair v. Chicago R. Co.*, 89 Mo. 383, 1 S. W. 350; *Sherburne v. Goodwin*, 44 N. H. 271; *Jackson v. Stackhouse*, 1 Cow. 122, 13 Am. Dec. 514; *Kirchner v. New Home Sewing Machine Co.*, 59 Hun. 186, 13 N. Y. S. 473; *McIntyre v. Williamson*, 1 Edw. 34; *Romaine v. Sweet*, 57 App. Div. 615, 68 N. Y. S. 516; *Eisert v. Bowen*, 117 App. Div. 488, 102 N. Y. S. 707, affirmed 191 N. Y. 544, 85 N. E. 1108. *Matlack's Appeal*, 7 W. & S. 79.

We respectfully submit that the judgment of the court below ought to be reversed; that the precedent should not be established that a human life in this state is only worth twenty-three dollars and fifteen cents.

A. S. Bozeman and R. H. & J. H. Thompson, for appellee.

Appellants have cited three cases as supporting their construction of the release for which they contend; these cases are, *Union Pac. R. Co. v. Artist*, 60 Fed. 365; *Lumley v. Wabash R. Co.*, 66 Fed. 66, and *Texas Pac. R. Co. v. Dashiell*, 198 U. S. 521. The cases cited from the Federal Reporters are so fully presented in the United States supreme court decision that an examination of the latter case alone is necessary. The conclusion reached in the United States supreme court case is not adverse to the judgment of the trial court in this case. The releases involved in the two cases are quite different. The concluding paragraph of the syllabus, 198 U. S. 521, correctly announces the principle decided by the federal supreme court in these words:

"General words in a release are to be limited and restrained to the particular words in the recital," and the holding was that the release then under consideration,

not being for all injuries but only for the particular ones specified, did not bar a suit for nonenumerated injuries. The principle and the holding have no application to the release not before this court, because in the present release there is no enumeration of particular injuries from which other injuries are excluded; the release is from "all claims by reason of injury sustained by me at Meridian, Mississippi, on the 20th day of September A. D., 1911." The added words "by the head of a maul coming off and striking me on the shoulder blade," are but a description of how the injury was received, and not a limitation on the scope of the release for the injury suffered.

The declaration fails to state a cause of action and is demurrable for a second reason, hence the judgment appealed from is the only correct judgment that could be rendered on the record. This second reason may be stated thus: This court, as well as the trial court, judicially knows all matters within the common knowledge of mankind. It is within common knowledge that a sledge hammer is a mere tool, and that in the course of its use its handle is subject to become loose and "shivered and shattered." It is not charged in the declaration that the hammer was loose on its handle, or that the handle was "shivered and shattered," when it was furnished by the company for use by Beddingfield, the decedent, and his co-servant Smith; nor does the declaration negative the idea that it became loose, "shivered and shattered" in the course of its use by them. While it is charged that the hammer was furnished by the company on the 11th of September, 1911, the day of the injury, it is not shown that its use on that day, after it was furnished and before the injury, did not produce its unsuitable and unsafe condition; and, while its unsafe condition is charged to have been unknown to decedent, it is not charged to have been unknown to Smith, the fellow-servant of the decedent. For these reasons, and because the injury complained of was not suffered while

decendent and his associate laborer were engaged in the hazardous business of operating a railroad train, the case falls within what is left in the law of this state of the common-law fellow-servant rule. The case is not within section 193 of the Constitution of 1890, or any statute on the same subject. Any farmer in the state may employ laborers to cut iron bolts, using cold chisels and sledge hammers, and unless a farmer who does so would be liable for an injury suffered by his employee under circumstances like those pleaded in this case, the railroad company is not liable to appellants. The constitutions, state and national, guarantee equal protection of the laws to all classes of persons. We will not elaborate this position, but content ourselves by reference to the brief for appellant, written by the writer of this brief, printed, in 88 Miss., 319 *et seq.*, and the opinion of the court in the case of *Bradford Construction Company v. Heflin*, 88 Miss. 314.

SMITH, C. J., delivered the opinion of the court.

The release here in question is not a general, but is a limited, one, covering only such damages as resulted to appellant from the bruising of his shoulder, and therefore does not cover the injuries complained of in the declaration, which injuries it is alleged in the replication were unknown to the parties thereto at the time the release was executed. *Texas & Pacific R. R. Co. v. Dashiell*, 198 U. S. 521, 25 Sup. Ct. 737, 49 L. Ed. 1150.

We are requested, however, by counsel for appellee to extend the demurrer back to the declaration and sustain it for the reason that the declaration is defective in two particulars: First, it does not allege "that the hammer was loose on its handle, or that the handle was shivered and shattered when it was furnished by the company for use by Beddingfield, the decendent, and his co-servant, Smith;" and, second, it does not allege that the deceased left neither widow nor children surviving him.

The first of these objections, if presented to us for decision by this record, is without merit; for the declaration expressly alleges that appellee "negligently and carelessly furnished the said Joe Smith with a sledge hammer to be used in cutting off the top of said bolt, the handle of which said hammer was defective in this, that it was shivered and shattered, which caused said sledge hammer to be and was loose on the handle."

While it is true that the declaration does not expressly allege that Beddingfield died leaving neither widow nor children surviving him, it does allege that appellants "are the brothers and sisters, and only brother and sister, and heirs, and the only heirs, at law of W. H. Beddingfield, deceased." If appellants are the only heirs at law of the deceased, it necessarily follows that he did not leave surviving him either widow, children, or descendants of children; and, while this allegation is defective in that it is merely a conclusion of law, nevertheless such defect would have been cured by verdict. Mississippi Code of 1906, section 808. Consequently the declaration is not so defective "that judgment according to law and the right of the cause cannot be given," so that the defect therein complained of can be availed of by demurrer only when specifically assigned as a ground thereof. Mississippi Code of 1906, section 754. The demurrer, therefore, cannot be extended back to the declaration. *Shoults v. Kemp*, 57 Miss. 218.

Reversed and remanded.

MOORE v. AMERICAN SURETY CO.

[70 South. 403.]

APPEAL AND ERROR. *Circuit court. Jurisdiction.*

Where plaintiff in the circuit court sued on an account consisting of two items, one for one hundred and eighty-nine dollars and eight cents, and one for one hundred dollars, but introduced evidence on only the item for one hundred and eighty-nine dollars and eight cents the supreme court on appeal will presume that this item was the only amount in controversy and that hence the circuit court was without jurisdiction.

APPEAL from the circuit court of Monroe county.

HON. CLAUDE CLAYTON, Judge.

Suit by the American Surety Company against Frank W. Moore.

From a judgment for plaintiff, defendant appeals.

Appellant was an employee of the Mississippi Cotton Oil Company, and appellee was the surety on a bond executed by him to that company for the faithful performance of his duties thereto. This bond, among other things, provided that appellant would save, defend, and keep harmless appellee "from and against all loss and damage of whatever nature or kind, and from all legal or other costs and expenses, direct or incidental, which the company shall or may at any time sustain or be put to (whether before or after any leading proceedings by or against it, to recover under this bond, and without notice to him thereof), or for, or by reason, or in consequence of the company having issued the present bond." The declaration, after setting out the execution of this bond, alleged:

"That under the terms of said obligation plaintiff becomes liable for, and on the 8th day of March, 1912, paid to the Mississippi Cotton Oil Company, the sum of one hundred and eighty-nine dollars and eight cents for defendant's benefit, and that plaintiff has expended divers

other sums of money, all as set out in the attached bill of particulars marked Exhibit B, and asked to be taken as a part of this declaration, for defendant's benefit and use, and at his request, and although often requested defendant has repaid no part of said sum so expended by plaintiff as surety for defendant, to plaintiff's damage in the sum of four hundred dollars and interest and costs of this suit."

The bill of particulars filed with this declaration was in the following words and figures:

| | |
|---|----------|
| Amount paid Mississippi Cotton Oil Company.... | \$189.08 |
| Expenses incurred in adjusting claim, attorney's fees, interest, etc..... | 100.00 |

No evidence whatever was introduced by appellee in support of the second item of this bill of particulars; the only evidence introduced being that it had been called on to and had paid the Mississippi Cotton Oil Company the sum of one hundred and eighty-nine dollars and eight cents, due it by appellant by virtue of his employment.

The case was submitted to the jury, and verdict rendered in appellee's favor for one hundred and eighty-nine dollars and eight cents.

Paine & Paine, for appellant.

We submit that the court erred in not sustaining the motion of appellant and that the cause should be reversed and dismissed, for the reason that the circuit court was without jurisdiction to try the case.

The amount as shown by the evidence in the case governs on questions of jurisdiction and not the amount alleged in the pleadings. See *Griffin v. McDaniel*, 63 Miss. "121"; *R. R. Co. v. Hitt, etc.*, 99 Miss. "679"; *Hilton v. Dickinson*, 108 U. S. C. "430"; *Lee v. Watson*, 1 Wallace "337"; 11th "Cyc." page "699"; 1 Ency. Pl. & Pr. "712."

We quote from the last reference as follows to wit: "While as has already been stated the amount in con-

troversty is generally deemed to be the amount as claimed where there is no bad faith on the part of the plaintiff, nevertheless a rule more perhaps in consonance with absolute justice widely prevails in the federal courts, and finds also support elsewhere, that wherever the real amount is made to appear, it is the all controlling criterion of jurisdiction. Under this rule the real amount as shown by the evidence produced at the trial governs on a question of jurisdiction when the allegations are in conflict with it. And the amount shown by the record, taken as a whole, when these disclose the real sum in dispute is determinative of the real question of jurisdiction."

We submit that under this rule and the record in the case that the only amount in controversy was the sum of one hundred and eighty-nine dollars and eight cents. The only witness for appellee as to the amount in controversy was John G. Thompson and as appears from the record on pages "18-22" he only claims and says the shortage was one hundred and eighty-nine dollars and eight cents and that that amount was paid to the Oil Mill by the appellee. There is not a scintilla of evidence that the appellee ever expended a cent either in expenses or attorney's fees which could go to compose the item of one hundred dollars sued on in the declaration. In addition to this, Record page "71," appellee asked but one charge from the court to the jury which was that if the jury from the evidence in the case believed that the appellee had to pay any money because of the shortage of appellant then it must return a verdict for said sum not to exceed one hundred and eighty-nine dollars and eight cents. So this court will observe that neither the appellee by its testimony nor its counsel in his instruction to the jury ever demanded any other sum than one hundred and eighty-nine dollars and eight cents. There was no contention from the evidence or from any charges given in the case of any amount due and claimed

other than the sum of one hundred and eighty-nine dollars and eight cents and interest.

We call the court's attention to the opinion of Judge MAYES in 99 Miss. "682" in the case of *R. R. Co. v. Hitt, et al.*, *supra*, in which he, discussing the case of *Griffin v. McDaniel* in 63 Miss. "121," says: "In the Griffin case it is held that, where the plaintiff honestly believes and contends for a sum above the jurisdiction of a justice of the peace, the circuit court has a right to entertain jurisdiction, because in such case the amount demanded is the real amount in controversy between the parties and this fixes the jurisdiction; but where, as in this case, there is no uncertainty as to how much the plaintiff seeks to recover, it makes no difference what amount is claimed in the declaration, if in truth there is no real demand for a sum sufficient to give the circuit court jurisdiction."

We submit that under the testimony in this case there can be no doubt that the only amount in controversy was the sum of one hundred and eighty-nine dollars and eight cents and interest. It seems to us that it is unnecessary for us to argue this point further or to submit other authorities because the precedents are unlimited in number and the application of the rule as uniform as the circumstances of the cases are various. An examination of the record and the authorities cited will sustain us on this proposition.

McFarland & McFarland, for appellee.

"The Jurisdiction of the court shall be determined by the pleadings, except where there is a purpose to evade the limitations on the jurisdiction by the averment of a false amount." *Fenn v. Harrington*, 54 Miss. 735 & 736. The amount demanded in the pleadings was sufficient to give the circuit court jurisdiction, and there is absolutely nothing to show that the amount was purposely magnified. Upon the same point see the following authorities:

Railroad Company v. Hitt & Rutherford, 99 Miss. 679; *Griffin v. Lower*, 37 Miss. 458; *Potts v. Hines*, 57 Miss. 735. See also, 11 Cyc. 775 and 25 Pacific 12.

The case of *Drown et al. v. Forrest*, 14 L. R. A. 80, holds that the mere failure to prove an amount due sufficient to give the court jurisdiction is not decisive against jurisdiction, where the declaration brings the case within the jurisdiction of the court. That it is necessary to go further and negative plaintiff's good faith in bringing the suit, by showing a consciousness on his part that he was not entitled to recover more than a justice could award. In *Potts v. Hines*, *supra*, the testimony of plaintiff showed only one hundred and forty-six dollars and seventy-nine cents due by defendant, an amount insufficient to give the court jurisdiction, but the declaration claimed an amount large enough to bring the case properly in that court, and upon motion to dismiss the case because of want of jurisdiction, the motion was overruled; which action the supreme court held proper.

In the case of *Griffin v. Lower*, *supra*, it is held that the amount sued for in the declaration is the test of jurisdiction; see pp. 460 and 461. This is a suit on a bond and the amount of damages claimed is the criterion of jurisdiction. *State v. Luckey*, 51 Miss. 528; *Shattuck v. Miller*, 50 Miss. 386.

Under the terms of the bond sued on in this case, appellee could recover all amounts expended by it on account of appellant's breach of contract with his employer, which amount as alleged in the declaration was sufficient to confer jurisdiction on the circuit court and if on the trial of the case appellee saw fit not to ask judgment for all of the items embraced in the declaration, that would not cause the circuit court to lose its jurisdiction. If this case were reversed appellee could still recover the amount claimed in the declaration.

"Plaintiff's" allegations of value govern in determining the jurisdiction of a federal circuit court except where upon the face of his own pleadings it is not legally possi-

ble for him to recover the jurisdictional amount, or where such allegations are fraudulently made for the purpose of creating the jurisdiction." *Smithers v. Smith*, 51 L. Ed. (U. S.), 656. On page 660 of this case the court says, "the plaintiff's claim with respect to the amount of damages incurred by him through the defendant's wrongful act measures, for jurisdictional purposes, the value of the matter in controversy." See also authorities there cited, and *Hilton v. Dickinson*, 27 L. Ed. (U. S.), 688.

Authorities cited by appellant are not, in point, being cases involving an amount fixed and certain and about which there can be no controversy; in fact those authorities sustain the position of appellee. In *Griffin v. McDaniel*, 63 Miss. 121, on page 125 the court says: "The rule announced in *Fenn v. Harrington*, 54 Miss. 733, has no application except in those cases in which the pleadings show that the cause is within the jurisdiction of the court, etc." The same announcement is made in *Ross v. Railroad*, 61 Miss. 12. We submit that this suit was not fraudulently filed in the circuit court; that the circuit court had jurisdiction of the case, and appellant had a fair trial; that the jury rendered a proper verdict and the judgment of the lower court should be sustained.

SMITH, C. J., delivered the opinion of the court.

(after stating the facts as above). Since appellee seeks by its evidence to recover only the one hundred and eighty-nine dollars and eight cents alleged to have been paid by it to the Mississippi Cotton Oil Company, we must presume that this is the only amount here in controversy; consequently the court below was without jurisdiction.

Reversed and remanded.

JONES ET AL. v. BOARD OF SUPERVISORS OF NEWTON COUNTY.

[70 South. 404.]

1. HIGHWAYS. *Districts. Change of organization. Notice. Statutes.*

A road district which has come under Laws 1914, chapter 176, for construction of roads by issuance of bonds and has made an issue which is outstanding, cannot also come under chapter 174, Laws 1914, for construction of roads by the proceeds of taxes, since section 14, Laws 1914, only authorizes the placing under that act districts "which have not issued bonds."

2. SAME.

Section 1, chapter 174, expressly provides that a road district shall not be created under the provisions of that act without thirty days notice of the intention of the board of supervisors to create such district and if twenty-five per cent of the qualified electors, petition against the creation, then such district cannot be created, until a majority of the qualified voters so declare in an election held for that purpose and an order of the board establishing such district, passed without any such notice or election is void.

APPEAL from the circuit court of Newton county.

HON. J. D. CARR, Judge.

Jesse D. Jones and others opposed the entry of an order of the board of supervisors of Newton county as to a road district and appealed to the circuit court and from its judgment again appeals.

The facts are fully stated in the opinion of the court.

Flowers, Brown, Chambers & Cooper, for appellant.

Lamar F. Easterling, Assistant Attorney-General, for appellee.

STEVENS, J., delivered the opinion of the court.

The board of supervisors of Newton county, upon the petition of citizens of district No. 4, adopted chapter 176,

Laws of 1914, for the construction and maintenance of the public roads of said district. After an election for that purpose, as provided by section 2 of the act, bonds in the sum of one hundred and fifty thousand dollars were authorized, and seventy-five thousand dollars of these bonds were sold. Commissioners were elected under the act, contracts were entered into for the construction of certain links of the highway, and the provisions of the act were being complied with generally, until March, 1915, when at the regular session of the board of supervisors an order was passed, on the verbal motion of one of the members, to adopt and the board thereupon proceeded to adopt, chapter 174, Laws of 1914, for said district, providing in the order "that nothing in this ordinance shall be construed so as to affect in any way any contract already let," etc. The order adopting chapter 174 was passed without notice to or vote by the qualified electors of the district. Section 1 of chapter 174, among other things, provides:

"That before creating such a road district the board of supervisors shall give notice either by publication in a newspaper published in the county or by posting notices in three public places in such proposed district, or both, for thirty days, of the proposed creation of such road district, and if twenty-five per cent, of the qualified electors of such district petition against this creation, then such district shall not be created unless at an election, ordered by the board of supervisors for the purpose, a majority of the qualified voters of such district, voting in such election, vote in favor of the creation of such district"

Section 14 of the same act provides:

"Road districts heretofore organized under other laws which have not issued bonds may be placed by the board of supervisors under this act and be subject to all its provisions."

Objections were made to the entry of this order by certain taxpayers who presented, and had signed, their bill

of exceptions, and thereby prosecuted an appeal to the circuit court. The circuit court sustained the action of the board in adopting chapter 174; and from this judgment of the court, appellants prosecute this appeal.

Chapter 176 purports to amend chapter 145 of the Laws of 1912, which in turn is amendatory to chapter 149 of the Laws of 1910. We are not called upon to comment upon all the essential differences in the provisions of chapter 176 and those of chapter 174, Laws of 1912. Chapter 176 is in the nature of a local improvement act, authorizing the qualified electors of a supervisor's district to issue long-term bonds, and to have the highway commission created by the act, under the supervision of the board of supervisors, to construct permanent and lasting highways with the proceeds. This plan contemplates the construction of permanent highways altogether on borrowed money. The highway commissioners are instructed with all expenditures. Provisions are made for an annual tax to maintain the roads and to pay the principal and interest of these bonds. The act does not repeal any road laws, but, on the contrary, provides how the general road laws of the county shall apply, prescribes the duties of road hands, and other details not necessary to be specified herein.

Chapter 174, on the contrary provides a plan for constructing and maintaining roads by an annual and especially high tax levy; long-term bonds are not provided for. By this plan, the taxpayers of this and perhaps a succeeding generation do not impose upon themselves a tremendous bond issue, pledging the revenues and credit of the future. Chapter 174 has no general provision for retiring bonds or paying principal and interest thereof. At the same time, it authorizes a higher annual tax levy than chapter 176. Section 14 authorizes road districts "which have not issued bonds" to come under the provisions of this chapter. It is our judgment that the inclusion of this class of districts excludes all others, and that the legislature did not intend for road districts or-

ganized under the provisions of chapter 176, with an outstanding bonded indebtedness, to adopt or come under the provisions of chapter 174. If it be conceded that chapter 174 can be adopted in addition to chapter 176, then it must be that both laws could operate for the same district at the same time; and the situation would present itself where the same road district would enjoy all the benefits and be subject to all the obligations of both laws at one and the same time. We cannot believe that such was the purpose of the legislature. If this could be done, the taxpayers of the district would assume the combined indebtedness authorized by both acts and inflict upon themselves the combined annual tax authorized by both laws. It would be possible to have two sets of highway commissioners, and outstanding contracts under both statutes at one and the same time. If, on the contrary, it be argued that chapter 174 could be adopted in lieu of chapter 176, then the district would have outstanding a large bonded indebtedness and valuable contracts entered into under the provisions of chapter 176 with no provision made by chapter 174 for retiring bonds or paying the principal and interest thereon.

There is another serious difficulty that really stands at the threshold of this case. Section 1 of chapter 174 expressly provides that a road district shall not be created under the provisions of this act without thirty days' notice of the intention of the board of supervisors to create such district; and if twenty-five per cent. of the qualified electors petition against the creation, then such district cannot be created until a majority of the qualified voters so declare in an election held for that purpose. The order of the board in the instant case was passed without any such notice or election; the people of the district were not consulted. The bonds provided by chapter 176 cannot be executed, and the road district outlined by chapter 174 cannot be created, without the will of the qualified electors of the district. The people in adopting the provisions of chapter 176 did not, of

course, authorize the board in the same breath to adopt chapter 174, or any law other than the one they were voting on. The case of *Weston v. Hancock County*, 98 Miss. 800, 54 So. 307, is very different from the case here presented. We do not mean to alter our holding that the board may change from one general method of working its public roads to another. In determining the right of the board to create a special district, with special privileges and burdens granted and imposed by an act that is applicable to districts to be created thereunder, and not to the county as a whole, we must look to the whole act under review, and from it gather the legislative intent. This is one case where referendum is required. The failure of the board to give notice under the provisions of section 1, chapter 174, is a sufficient reason for holding that said chapter and the provisions thereof were not legally adopted; and the order of the board of supervisors adopting the provisions of this chapter was and is void, and the judgment of the circuit court affirming this order was erroneous.

Reversed, and judgment here for appellants.

Reversed.

DARNELL LUMBER Co. v. BONTALL.

[70 South. 405.]

MASTER AND SERVANT. *Injury. Question for jury.*

In an action by a servant for injury in repairing machinery where there is a sharp conflict in the evidence as to whether plaintiff followed or disobeyed instructions the case should go to the jury.

APPEAL from the circuit court of Washington county.

HON. MONROE MCCLURE, Judge.

Suit by Alfred Bontall against the Darnell Lumber Company. From a judgment for plaintiff, defendant appeals.

Appellee filed an action against the appellant for damages due to injuries alleged by him to have been received while in the employ of the appellant as the result of the appellant's negligence in failing to provide safe machinery, or advise him of defects in the machinery upon which he was working at the time of the accident. The declaration alleges that he was directed by the appellant to repair and overhaul certain machinery attached to and being a part of a sawdust conveyor, and that after making the necessary repairs and starting the machinery, his clothing was caught by a projecting set screw which held a collar on a revolving shaft, and that he knew nothing of the defectiveness of said set screw which was uncovered and projecting on said shaft and had not been warned by appellant of this defect, and that the revolutions of said shaft threw appellee, when his clothing became caught by the said screw, and caused him to become entangled in a pulley so that his body was drawn around the revolving shaft many times, breaking both legs and one arm, and severely injuring, and bruising, and tearing his muscles and various parts of his body, wrenching his back and crippling him for life, and that he was confined to a hospital for seventy-two days, suffering great pain as a result of said injuries. There was a verdict for appellee in the sum of twenty-two thousand, five hundred dollars, from which an appeal was taken.

Marsilliot & Chandler and Wynn, Wasson & Wynn, for appellant.

Hirsh, Dent & Landau, M. M. Hartman and A. J. Rose, for appellee.

PER CURIAM. Briefly stated, appellant says that appellee was employed to inspect and repair the confessedly

defective machinery of a sawmill, and that he was specifically instructed to watch the machinery while it was in motion, for the purpose of diagnosing and locating the defects; that appellant departed from his instructions and was injured.

Appellee contends that he was ordered to repair a certain specified defect in a certain machine; and while doing the work which he was ordered to do, he was caught by an unguarded set screw and injured.

The evidence was in sharp conflict, and we believe that the jury was warranted in finding for appellee, plaintiff below.

Affirmed.

MYERS ET AL. v. VIVERETT.

[70 South. 449.]

1. *WILLS. Deeds. Life estate. Adverse possession under life tenant. Vender and purchaser. Bona-fide purchaser. Notice. Record destroyed by fire. Estoppel. Failure to assert title. Ejectment. Common source of title.*

Where plaintiff's father and mother executed an instrument providing that in consideration of five dollars, and parental affection which the first parties had towards the second parties, they thereby granted, gave, bargined and sold to the second parties the lands therein described, to have and to hold as joint owners thereof in fee simple, that the first parties for themselves, their heirs covenanted and agreed to defend and warrant the title to the second parties, but that it was understood and agreed that the first parties were to hold possession and exercise control and ownership over such lands during their natural lives, and that at their death the second parties were to be the sole owners thereof with personal property of which they might die seized and possessed. Such an instrument in so far as the land conveyed was not a will but a deed with the reservation of a life estate to the grantors.

2. SAME.

Under such a deed the statute of limitations did not commence to run against the grantees until the death of both the grantors.

3. VENDER AND PURCHASER. *Bona-fide purchaser. Notice. Record of deeds.*

Purchaser of the land were charged with notice of the title of parties claiming under a prior deed which had been recorded although the record of such deed had been destroyed by fire and not again recorded.

4. VENDER AND PURCHASER. *Bona-fide purchaser. Notice. Records destroyed by fire.*

Code 1906, section 3185, first enacted in 1892 providing that a lost, stolen or destroyed record shall not constitute constructive notice longer than three years from the time that chapter became operative, or from the loss, theft, or destruction, unless within that time the instrument shall again be placed of record or proceedings be begun to perfect the record, has no retrospective effect. Its clear meaning is: 1st, that a record which has been lost, stolen or destroyed prior to the time the statute became operative shall not constitute constructive notice longer than three years from such time, unless within that time the instrument shall again be placed on the record, or proceedings be begun to perfect the record and, 2nd, that a record lost, stolen or destroyed after the statute became operative shall not constitute constructive notice longer than three years from the time of the loss, theft or destruction thereof, unless within that time the instrument shall again be placed on the record or proceedings be begun to perfect the record.

5. ESTOPPEL. *Failure to assert title.*

Where the grantees in a second deed to land, each had constructive notice of a prior deed under which the grantees therein claimed title and it does not appear from the evidence that any one of the grantees under the second deed relied upon any act or statement of the grantees under the first deed as indicating that they claimed no interest in the land, and the record does not present a case of estoppel because of the acceptance of benefits in such case the grantees under the first deed are not estopped from asserting title to the land.

6. EJECTMENT. *Common source of title.*

Where a husband and wife conveyed land by deed to their children reserving a life estate in the same and the deed was duly recorded and after the death of the husband, the wife conveyed

the land in fee simple to third parties. In a suit between the children and such third parties for the land, if the wife's only interest in the land was the life estate reserved in the deed to her children, then the common source of title was her husband. If the wife and not her husband, was in fact the owner of the land when the deed to the children was made, then she was the common source from which the title of the parties was derived.

APPEAL from the chancery court of Newton county.

HON. SAM WHITMAN, Chancellor.

Suit by Mrs. T. Myers and another against L. L. Viv-
erett to cancel claim of title to land. From a decree for
defendants, plaintiffs appeal.

Complainants claim title under an instrument executed
by their father and mother, Benjamin and Eunice Shep-
herd, which is as follows:

“This deed of conveyance made and entered into this
the 10th day of November, 1873, between Benjamin Shep-
herd and his wife, Eunice Shepherd, of the first part, and
Rachel and Mary Jane Shepherd, of the second part, all
of the county of Newton, state of Mississippi, witnesseth
that for and in consideration of the sum of five dollars,
and for the further consideration of the parental affec-
tion, they have and bear for and toward the said second
parties as their children, do by these presents grant, give,
bargain, and sell to the said second parties the follow-
ing lands, tenements, and hereditaments situate in said
county, to-wit: west half southeast quarter, section 12,
and the west half of the northeast quarter and the east
half, northwest quarter, section 13, township 8, range 11
east. To have and to hold said premises as joint owners
thereof to their own proper use and benefit in fee sim-
ple, and the said first parties for themselves, their heirs,
executors, and administrators covenant and agree to de-
fend and warrant the title of said premises to the said
second parties against the claim of all persons whatever,
but it is nevertheless distinctly understood and agreed
that the said first parties are to hold possession and exer-
cise control and ownership to and over said lands, tene-

ments, etc., during their natural lives, and at their deaths the said second parties are to be the sole owners thereof with the personal property of which they may die seised and possessed.

“In witness whereof the said first parties have hereunto set their hands and seals day and year first above written.”

Appellants by their bill filed in the court below seek to recover possession from appellee of the land in controversy and to have his claim thereto cancelled as a cloud upon their title. Appellants claim title to the land under an instrument executed by their father and mother, Benjamin and Eunice Shepherd, on the 10th day of September, 1873. This instrument was on the date of its execution duly recorded in the office of the chancery clerk of Newton county; and the reporter is directed to set it out in full. At the time of the execution of this instrument Benjamin Shepherd and his wife, together with several of their children, including appellants, were living upon the land, and continued so to do until the death of Benjamin Shepherd, which occurred on the 8th day of January, 1876. After the death of Benjamin Shepherd, Mrs. Shepherd and several of her children, including appellant Rachel V. Shepherd, and probably appellant Myers, who was formerly Mary Jane Shepherd, continued to live on the land until December of the next year, when she executed and delivered to Mrs. S. J. Livingstone a deed to a part of the land, purporting to convey a fee-simple title thereto. The consideration named in this deed was four hundred dollars, but the real consideration was an exchange of lands; Mrs. Livingstone executing to Mrs. Shepherd a deed to certain other land to which Mrs. Shepherd and her family, including appellant Rachel Shepherd, but not appellant Myers, moved, and on which they continued to reside for several years. Appellant Mrs. G. T. Myers, formerly Mary Jane Shepherd, was then married to Myers; and, while the evidence leaves it in doubt as to whether or not Mrs. Myers at the time of

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the exchange was living with her mother, it is clear, however, that she did not go with her to the land obtained from Mrs. Livingston.

The negotiations leading up to this exchange of land were conducted by William Shepherd, a son of Mrs. Eunice Shepherd and brother of appellants, in whose testimony appear the following questions and answers:

"Q. State, Mr. Shepherd, what knowledge your two sisters, Mrs. Myers and Miss Rachel Shepherd, had relative to the sale of the land or trade by your mother. A. They had as much knowledge of it as I had. Q. What knowledge did you have? A. The family talked it before it was traded, and I made the trade myself for my mother and these girls, and my mother got me to go and see Mrs. Livingstone. I think my mother had seen Mrs. Livingstone before that, and they couldn't hardly get together, and they got me to go and see her, and told me, if we couldn't trade like we wanted to, to put in two hundred and forty acres that my mother owned—three eighties. I went to see Mrs. Livingstone, and me and her traded acre for acre. That left us one eighty back in Newton county."

It does not appear what statement William Shepherd made to Mrs. Livingstone in order to induce her to agree to the exchange, and the evidence is wholly silent as to any information she may have had relative to appellants' title; in fact, it discloses nothing along this line except the mere fact that the exchange was made and the deeds pursuant thereto executed. Appellants both deny that they participated in any way in bringing about this exchange of lands.

Some time after the exchange between Mrs. Shepherd and Mrs. Livingstone, Mrs. Shepherd sold to W. B. F. Adams the remainder of the land included in the instrument under which appellant claim title. This sale was also negotiated by William Shepherd, who, on being asked at whose request and on whose authority he made it, answered:

"My mother's, my sisters,' and my brother Henry Shepherd's—the whole family's. It was their request that I go and sell it and get just what I could for it."

What representations, if any, he made to Adams in order to induce him to purchase do not appear. Participation in this sale was also denied by appellants; they claiming not to have been consulted relative thereto.

Appellee claims title by mesne conveyances through these two deeds executed by Mrs. Shepherd to Mrs. Livingstone and Mr. Adams. Prior to the death of Mrs. Shepherd, which occurred in September, 1900, she sold to William Shepherd the land obtained by her from Mrs. Livingstone. This sale was made with the knowledge and consent of Rachel V. Shepherd, to whom the money was paid by her brother William, as was also the money received by him from the sale of the land to W. B. F. Adams. Mrs. Shepherd at this time was getting old; and she was being looked after by her daughter Rachel. The money from both these sources seems to have been used for the support of Mrs. Shepherd and the children then living with her, a portion of it being applied after her death to the payment of debts due by her. Appellants were both over twenty-one years of age at the time of the execution by their mother of the deed to Mrs. Livingstone.

The bill of complaint, which was filed within ten years from the death of Mrs. Shepherd, was on final hearing dismissed.

Foy & Banks and Flowers, Brown & Davis, for appellants.

Wilson & Johnson and Wells, May & Sanders, for appellee.

SMITH, C. J., delivered the opinion of the court.

(After stating the facts as above.) A. The instrument under which appellants claim title, in so far as

it deals with the land therein described, is not a will, but is a deed by which the land was conveyed to appellants, subject to a life estate reserved to the grantors. *McDaniel v. Johns*, 45 Miss. 632; *Wall v. Wall*, 30 Miss. 91, 64 Am. Dec. 147.

B. There is no merit in the contention of counsel for appellee that, conceding the instrument under which appellants claim title is a deed, and not a will, the statute of limitations commenced to run against appellants upon the death of their father, and therefore appellee's title is now perfect by adverse possession. Appellee's possession did not become adverse to appellants until the death of both of the life tenants.

C. When appellee purchased the land, he was charged with notice of appellants' title thereto, although the record of the deed under which they claim had been destroyed by fire, and it had not then been again recorded. *Myers v. Buchanan*, 46 Miss. 397. Appellee contends, however, that section 3185 of the Mississippi Code of 1906, first enacted in 1892, operates retrospectively, so that the record of appellants' deed which was destroyed by fire did not constitute constructive notice thereof longer than three years after its destruction; it not having been again placed on the record within that time. This statute has no such retrospective effect. Its clear meaning is: First, that a record which had been lost, stolen, or destroyed prior to the time the statute became operative shall not constitute constructive notice longer than three years from such time, "unless within that time the instrument shall be again placed on the record or proceedings be begun to perfect the record;" and, second, that a record lost, stolen, or destroyed after the statute became operative shall not constitute constructive notice longer than three years from the time of the loss, theft, or destruction thereof "unless within that time the instrument shall be again placed on the record or proceedings be begun to perfect the record."

D. Mrs. Livingstone, Adams, and appellee each had constructive notice of the deed under which appellants claim title. It does not appear from the evidence that any one of them relied upon any act or statement of appellants as indicating that they claimed no interest in the land, and the record does not present a case of estoppel because of the acceptance of benefits. Appellants, therefore, are not now estopped from asserting title to the land.

E. There is no merit in appellee's contention that the evidence does not disclose a common source from which his and appellants' titles are derived. If Mrs. Shepherd's only interest in the land was the life estate reserved in the deed under which appellants claim, the common source of title was her husband, Benjamin Shepherd. If Mrs. Shepherd, and not her husband, was, in fact, the owner of the land, she is the common source from which the titles of the parties hereto are derived.

Reversed, and decree here in accordance with the prayer of appellants' bill.

Reversed.

On Suggestion of Error.

The decree of the court below was on a former day reversed, and decree rendered here in accordance with the prayer of appellants' bill, except that the cause was remanded for the purpose of ascertaining the amount due appellants for rent.

The suggestion of error filed herein by appellee will be overruled; but our former judgment will be amended so as to include appellee's claim for improvements in the account to be stated in the court below.

Suggestion of error overruled.

GRENADA BANK v. BOURKE ET AL.

[70 South. 449.]

1. **ABATEMENT AND REVIVAL.** *Other action pending. Dismissal. Effect. Plea.*

While at the common law the rule was to sustain a plea in abatement of another suit pending, if it was true at the time the plea was filed, but the tendency of the later cases and a preponderance of authorities sustain the doctrine, that it is a good answer to the plea of pendency of a prior action for the same cause, that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled, unless the prior suit is pending at the time of the trial of the second.

2. **ABATEMENT AND REVIVAL.** *Plea.*

Pleas in abatement on the ground of the pendency of another suit for the same cause of action are not favored by our courts.

APPEAL from the circuit court of Grenada county.

HON. J. A. TEAT, Judge.

Suit by the Grenada Bank against W. E. Bourke and others. From a judgment sustaining a demurrer to its replication to defendants plea in abatement, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Roane & Roane, for appellant.

We submit that this action of the court in sustaining appellee's demurrer and dismissing appellant's case was clearly erroneous, for the following reasons: 1st: Because in the two suits in the circuit and chancery courts there was no identity of causes of action; 2nd: Because there was no identity in persons and parties to the actions, either parties plaintiff or defendant; 3rd: Because there was no identity of subject-matter in the two suits; 4th: Because all of the joint makers of the note

sued upon by appellant in the circuit court were not parties to the chancery proceeding, either as complainants or defendants; 5th: Because neither the firm of Caffey & Horton, nor P. A. Horton an individual member of said firm, were parties to the bill of complaint filed in the chancery court, and the said firm of Caffey & Horton were joint makers of the note sued upon by appellant; 6th: Because appellant was entitled to his remedy against each and every joint maker of the note, and the action of the lower court, in sustaining the demurrer and dismissing the suit, deprived appellant of this right; 7th: Because in the chancery proceeding appellant could not, in any phase of the case, have obtained the relief to which it was entitled. Relief was not obtainable even by cross-bill; 8th: Because the chancery court, in the decree rendered therein, dismissed the bill of complaint as to appellant and refused to order the cancellation or surrender of the note sued upon in this case; 9th: Because in the chancery court no decree could have been entered against either the firm of Caffey & Horton or against P. A. Horton, an individual member of the firm; 10th: Because at the time of the hearing of the demurrer by the lower court no action of any kind whatsoever was pending in the chancery court. The decree of said court had been rendered dismissing the bill of complaint as to appellant herein, as to the note sued upon in this cause; 11th: Because appellant had a right to pursue its remedy in a court of law upon the note held by it, after default in the payment thereof; 12th: Because, if the action of the lower court is sustained and appellant's case is dismissed, appellant will be without remedy, either at law or equity, to collect this note, which the chancery court, in its decree, has said should not be cancelled or surrendered to complainant, Boushe, one of the joint makers there, thus deciding that the Grenada Bank, appellant herein, was the rightful and legal holder and owner of said note sued upon in this cause.

We submit that before a plea in abatement, setting up a former suit pending, will be sustained, it must be shown that the suits were, 1st: Between the same parties; 2nd: For the same subject matter; 3rd: Seeking the same kind of relief. A plea in abatement and a plea of "*res adjudicata*" are on all fours, and our court has held in the case of *Creegan v. Hymean*, 46 So. 952, speaking through Chief Justice WHITFIELD, as follows: Before the plea of *res adjudicata* can prevail four things must be shown: 1st; identity in the thing sued for; 2nd: Identity in the cause of action; 3rd; identity of persons and parties to the action; and 4th; identity of the quality of the person for or against whom the claim is made." (Citing in above case 24 Am. & Eng. Ency Law, 778).

None of the essentials set forth by this court above are present in this case. 5 Ohio C. C. 69; 1 Am. Digest (Cent. Ed.), p. 60; 41 Cal. 61; 1. Am. Digest (Cent. Ed.), p. 59; 71 Miss. 767, 15 So. 107; 5 Tex. 127, 20 Conn. 510; 1 Am. Digest (Am. Ed.) 103; *Bank v. Leonard*, 20 How. Prac. 193; 27 Miss. 461; 67 Miss. 183; 83 Miss. 37; 65 Miss. 498, 58 Miss. 266; 34 Md. 249; 27 Miss. 466 (Quoting Story Equity Pl., 740-741); 22 Fed. Rep. 710, 64 Ala. 330; 23 Iowa 100, 92 Am. Rep. 413; 17 Ala. 430; 65 Miss. 499; 1 Am. Digest. (Decennial Ed.), 15; 58 Miss. 806, 67 Miss. 183; 83 Miss. 37, 58 Miss. 806; 83 Miss. 37; 29 Miss. 41; 33 Miss. 141, 5 8Miss. 266; 3 How. Prac. 414, 17 How. Prac. 69; 10 N. Y. 500, La. An. 26; 70 N. W. 428; Code 1906, sec. 3935; 62 Miss. 350; 58 Miss. 398; *Wright v. Frank*, 61 Miss. 32; 45 Miss. 627, 60 Miss. 32; 82 Am. St. Rep. 586; 74 Tex. 522, 75 Iowa 537; 13 Hun. 33, 77 N. Y. 164, 83 Cal. 270; 17 Am. St. Rep. 248, 74 Tex. 522; 12 S. W. 216, 49 Iowa 183; 71 Iowa 306, 75 Iowa 533, 45 Minn. 102; 47 N. W. 462; 77 N. Y. 164; 65 L. R. A. 673, 115 Cal. 180; 45 Mo. 294; 44 Miss. 235, 67 Miss. 498; 45 Mo. 294; 4 La. Ann. 520, 8 La. Ann. 15; 1 Am. Digest p. 59; 39 Miss. 218, 77 Miss. 714; 78 Miss. 259, 79 Miss. 445-459; 90 Miss. 127; 1 Ency. Pl. & Pr. 761-762-763; 55 Miss. 145, 73 Miss. 665, 71 Miss. 614.

If the action of the lower court is sustained in this case then we are confronted with the rather remarkable condition of an undisputed right without a remedy; appellant with the possession of the note sued on herein, but denied a remedy to enforce his acknowledged right. We submit that the assignment of error herein is well taken, and that the lower court's action in sustaining the demurrer and dismissing appellant's suit should be reversed.

Dinkins & Caldwell, for appellant.

As to whether the plea in abatement setting up the pendency of another action was good depends upon the *status* of the cases at the time of the trial of the second cause. If there had been a discontinuance or dismissal of the first suit at the time of the trial of the second suit, then the plea is not good.

"While at the common law the rule was to sustain a plea in abatement of another suit pending if it was true at the time the plea was filed, but the tendency of the later cases and a preponderance of authorities sustain the doctrine that it is a good answer to the plea of pendency of a prior action for the same cause that the former suit has been discontinued, whether discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled unless the prior suit is pending at the time of the trial of the second." 1 Cyc., 25 and Note.

"The modern tendency is to regard the objection as removed if the dismissal or termination occurs after the plea is filed. And it has been held that dismissal at any time before the hearing on the plea, or even at the trial of the second action is not too late." 1 Standard Proc., 1011.

"When the pendency of another suit is set up to defeat an action, the case must be the same. There must be the same parties, or, at least, such as represent the

same interest, there must be the same rights asserted and the same relief prayed for. This must be founded on the same facts, and the title, or essential basis of the relief sought must be the same. The identity in these particulars should be such that if the pending case had already been disposed of, it could be pleaded in bar as a former adjudication of the same matter before the same parties." *Watson v. Jones*, 13 Wall. 679; 20 L. Ed. 671; *Barrows v. Kindred*, 4 Wall. 299; 18 L. Ed., 393; 1 Cyc. 28; *Kaplan v. Coleman*, 60 So. 886.

It is not true that a court, having obtained jurisdiction of the subject-matter of suit and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and in some instance requiring the decision of the same question exactly. In examining into the exclusive character of the jurisdiction in such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. A party having notes secured by a mortgage on real estate, may, unless restrained by a statute, sue in the court of chancery to foreclose his mortgage and in a court of law to recover a judgment on his note, and in another court of law in an action of ejectment for the possession of the land. Here, in all of the suits, the only question at issue may be the existence of the debt secured by the mortgage. But as the relief sought is different and the mode of procedure is different, the jurisdiction of neither court is affected by the proceedings in the other." *Buck v. Colbath*, 3 Wall. 334, 18 L. Ed. 257.

In order that the pendency of one suit may be set up to defeat another the cases must be the same; with the same parties, the same rights asserted, the same relief demanded, founded on the same facts and the bases of relief the same. *U. S. v. The Haytian Republic*, 154 U. S. 124; 38 L. Ed. 932; 1 Cyc. 27.

The demurrer is based on the old common-law idea that if it was true at the time the plea was filed that another action was pending that the replication is not good. The leading authority for this contention is the case of *Frogg v. Long*, 28 Am. Dec. 69, which is the decision of the Kentucky court which also holds that the pendency of a case in the federal court is a bar and can be pleaded in abatement to an action in the state court, which holding is contrary to the great weight of authority, as is shown in note to *Wilson v. Milliken*, 82 A. S. R. 587. The *Frogg* case is cited in *Dozier v. Williams*, 47 Miss. 605, as authority, but as that was a case for a statutory penalty the court held that the one who first filed suit should have the preference and the citation of this *Frogg* case, we do not think, was intended to approve everything decided therein.

In the case of *Coaldale B. & T. Co. v. So. Const. Co.*, 19 So. 45, the court of Alabama at first took the same view as in the *Frogg* case, but on a rehearing the court reversed its former holding and said: "That the decided weight of modern current authority favors the view that the dismissal of a former action before the interposition of the plea in abatement of the new suit removes the cause of the abatement."

In *Moore v. Hopkins*, 17 Am. St. Rep. 248, it is said that a judgment of dismissal of a former action, entered after the trial of a second action has commenced, but before its conclusion, is a sufficient answer to a plea in abatement of the second action. This holding is by the supreme court of California but we think it is the law in this state.

Wm. C. McLean, for appellees.

A careful reading of the authorities relied upon by appellant will disclose and demonstrate the proposition that in order for a plea in abatement to be good it is not necessary for the same, identical parties to be in-

volved in the litigation, but if the suit is substantially between the same parties, and if the subject-matter of the suit is the same, then the plea is good. The final analysis of all the cases cited by appellant, leads to this just conclusion. The principle is that a party shall not be subjected to two suits over the same cause of action; the second action is vexatious and oppressive—and this the law will not permit. We impress upon the court that the question presented in the two suits is identically the same; the very same question that was presented in the chancery suit brought by Boushe against the Bank is, and was, the very same question presented in the action brought at law. What was that question? Boushe alleged in his bill of complaint wherein the Bank was made a party, that the note held by the Bank was given to the Bank, not as a settlement of his indebtedness to Windham & Miers, but was given pending a settlement, with the distinct understanding and agreement among all of the parties, including the Bank, that whenever a settlement should be had between him and Windham & Miers, only such an amount was to be paid upon the note as was found to be due Windham & Miers; and the bill further charged that nothing was due by complainant to Windham & Miers, and that consequently, the note was void, and the bill prayed that the note be cancelled and surrendered. The defendant Bank did not pretend that this bill was not a good bill, but, upon the other hand, answered the bill, and took issue thereon, and while this issue was pending the Bank instituted this suit at law upon the note; the chancery court went into an investigation of the accounts between Boushe and Windham & Miers, and found that Boushe was entitled to a credit upon the note, and so decreed. Now, we put this question: "If the chancery court had found as a fact that Boushe owed Windham & Miers nothing at the date of the execution of the note, then the decree would have been that the note be cancelled and surrendered." Now, if such a finding had been made, it is manifest that this

would have ended the litigation upon the note, and the Bank could not have sustained any action upon the note. Why? Because the matter would have been *res adjudicata*.

The fact that Horton, who was a mere surety—if that—upon the note, was not a party to the chancery proceedings, is immaterial. The very identical question presented in the chancery proceedings is the same—the identical—question presented in the law proceedings; that question is: Was Boushe liable on the note? Suppose the Grenada Bank had made its answer a cross-bill, and had asked for a personal decree against Boushe on the note (as it had a right to do), and suppose the chancery court had found that Boushe was due Windham & Miers something, and further decreed that Boushe pay the Bank the amount of the note, would that decree not be a perfect defense to the present suit? To ask, is to answer the question. But the fact that the Bank did not see proper to make its answer a cross-bill is no reason why the plea of pending suit should not be allowed.

Cowles Horton, for appellees.

Where two courts have concurrent jurisdiction, an action begun in one of them will abate a suit, involving the same subject-matter, brought in the other, pending the exercise of the prior jurisdiction. *Shelby v. Bacon*, 10 How. (U. S.) 68, 13 L. Ed. 67; *Ricks v. Richardson*, 70 Miss. 427; *Griffith v. Waterworks Co.*, 88 Miss. 385.

In such case, it is improper for the second court to assume jurisdiction, the effect of which would be to interfere with, hinder or in any way embarrass the prior jurisdiction. *Martin v. O'Brien*, 34 Miss. 39; *Ex parte Chetwood*, 165 U. S. 443, 41 L. Ed. 782; *Railroad Co. v. Vinet*, 132 U. S. 478, 33 L. Ed. 400; *Wallace v. O'Connell*, 13 Pet. (U. S.) 136, 10 L. Ed. 135; *Shoemaker v. French*, Chase, 267; *Insurance Company v. Howell*, 24 N. J. 239; *Freeman v. Howe*, 65 U. S. 450, 16 L. Ed. 749.

There is no requirement that, in cases like the one at bar, the parties should be the same, but, if otherwise, the parties in this case are substantially the same and represent the same interest, thereby satisfying the rule. 1 Cyc. 33; 32 Cyc. 388; *Watson v. Jones*, 13 Wall. 679, 20 L. Ed. 671; *U. S. v. Haytian Republic*, 154 U. S. 124, 38 L. Ed. 932; *Manly v. Kidd*, 33 Miss. 147; *Griffith v. Waterworks Co.*, 88 Miss. 385.

The two jurisdictions were necessarily confictory and involving the same subject-matter, since one court was seeking to annul and cancel, and the other court at the same time seeking to uphold, effectuate, and enforce, the same instrument. Hence the doctrine, *qui prior est tempore, portior est jure*, applies. Authorities, *supra*.

Appellant had a plain remedy to enforce in the chancery court the rights here sought to be enforced. The chancery court would enforce them, though strictly legal. *Atkinson v. Felder*, 78 Miss. 85; *State v. Marshall*, 100 Miss. 642.

Its remedies against Horton might have been enforced in that court, as against the others, so long as the chancery court retained the case. The procedure would have been neither novel or without authority to support it. *Lemmon v. Dunn*, 61 Miss. 211; *Foundry Co. v. Ice Co.*, 72 Miss. 516.

Appellant might have filed its cross-bill against the parties in the chancery court, and sued Horton separately, had it not desired to have him joined, as above shown, in that suit. Code 1906, Ch. 71 and cases cited therein.

Having this remedy, it became appellant's duty to enforce it and the bringing of this suit was unnecessary and improper. *Martin v. O'Brien*, 34 Miss. 39; *Phelps v. Edgerton*, 65 U. S. 450, 16 L. Ed. 752; *Ricks v. Richardson*, 70 Miss. 427.

If appellant had filed cross-bill and appellee had dismissed the chancery suit and the cross-bill been carried with it, this would have finally terminated that jurisdiction, leaving appellant the right to then institute its

suit. In no event, therefore, could appellant have lost this right, and in no way has been in the dangers mentioned in its argument.

It was the duty of the chancery court to have determined the bank's rights on presentation of them so long as it retained jurisdiction (*Atkinson v. Felder*; *State v. Marshall, supra*), and, having in that court a full, plain and adequate remedy, so long as it retained jurisdiction at all, it was improper for appellant to institute a suit, the effect of which would be to bring about a conflict. *Ricks v. Richardson*, and authorities *supra*.

The plea is to be determined as of the time of its filing, without reference to subsequent developments. Hence the replication was demurrable. *Frogg v. Long*, 28 Am. Dec. 69; *Dozier v. Williams*, 47 Miss. 605.

A dismissal or discontinuance of a case finally ends it—*Fire Insurance Co. v. Francis*, 52 Miss. 467—and the authorities cited by counsel that a dismissal or discontinuance may be set up in answer to the plea are inapplicable, the case in chancery not being terminated.

A case dismissed terminates the jurisdiction and it cannot be said to be a pending suit, nor a purchaser of property involved in such a suit a purchaser *pendente lite*. 25 Cyc. 1470 (B).

The chancery case, however, is still a pending one, and were property involved, a purchaser at this time would take a *pendente lite* and with a title subject to be divested on appeal. *Smith v. Burns*, 72 Miss. 966; *Nelson v. Ratliff*, 72 Miss. 656; *Tucker v. Wilson*, 697.

A reversal of this chancery suit would be to leave the jurisdictions between the two courts still conflictory, and the circuit court would, therefore, have done a useless thing. Scrambles between courts for priority should be avoided, and the test adhered to that priority of jurisdiction controls priority of decision. *Sharon v. Terry*, 36 Fed. Rep. 337.

Cook, J., delivered the opinion of the court.

This suit was instituted in the circuit court of Grenada county by the appellant against the appellees on a promissory note. Appellees interposed a plea in abatement setting up a pending suit in the chancery court, in which suit it was alleged that the same questions were involved between the same parties. Appellant filed a replication to the plea in abatement averring, among other things, that since the institution of the present suit the case had been disposed of in the chancery court. To this replication a demurrer was interposed and sustained by the court.

Briefly stated, the point for our determination is, does the fact that the suit in the chancery court was pending at the time suit in the circuit court was begun abate this suit, although the suit in the chancery court had been finally disposed of by dismissing the bill of complaint against plaintiff below, appellant here, before the replication was filed to the plea in abatement?

We answer this question in the negative. We hold that the demurrer to the replication should have been overruled.

"While at the common law the rule was to sustain a plea in abatement of another suit pending, if it was true at the time the plea was filed, but the tendency of the later cases, and a preponderance of authorities sustain the doctrine, that it is a good answer to the plea of pendency of a prior action for the same cause that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled, unless the prior suit is pending at the time of the trial of the second." 1 Cyc. 25.

"The modern tendency is to regard the objection as removed if the dismissal or termination occurs after the plea is filed. And it has been held that dismissal at any time before the hearing on the plea, or even at the trial

of the second action, is not too late." 1 Standard Proc. 1011.

We find nothing in our books contrary to the rules just quoted, but we do find that pleas in abatement of the character here involved are looked upon with disfavor by this court. *Wood Preserving Co. v. Myer*, 76 Miss. 586, 25 So. 297.

The case is reversed, the demurrer overruled, and the cause is remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

A. S. BARBORO & Co. v. SERIO.

[70 South. 458.]

JUSTICE OF PEACE. *Jurisdiction. Collateral issues.*

In a suit of attachment instituted before a justice for an amount within his jurisdiction, the justice has jurisdiction to award damages for wrongfully suing out of the attachment in an amount exceeding the jurisdictional amount of justices of the peace, since defendant's claim for damages is a mere collateral matter arising out of and resulting from the issue and levy of the attachment writ; and it is within the power of the legislature to confer upon courts "authority to determine all collateral matters that may arise in the process of a cause over which they have constitutional jurisdiction."

APPEAL from the circuit court of Tallahatchie county.
HON. N. A. TAYLOR, Judge.

Suit by A. S. Barboro & Co., against R. Serio, begun by attachment issued from a justice court. There was a judgment awarding damages to defendant and plaintiff brought *certiorari*.

110 Miss.—23

The judgment being affirmed in the circuit court, plaintiff appeals.

Appellant, a corporation, instituted a suit by attachment in the court of a justice of the peace, to recover of appellee the sum of one hundred and fifty-six dollars and forty-three cents, alleged to be due it for goods sold and delivered. When the cause came on to be heard, a judgment was entered, reciting that:

"This day, this cause coming on to be heard on the issue of the attachment herein on the merits thereof, both plaintiff and defendant being present by personal representatives and by attorneys, and both agreeing to waive formal pleading herein, and the court having heard the same and the testimony of the witnesses and the argument of counsel, it is ordered that the attachment herein be dismissed, abated and discharged; and the property of the defendant levied upon under the writ of attachment herein be discharged "

—and then awarding appellees the sum of four hundred and twenty-five dollars damages for the wrongful suing out of the attachment, and upon the merits awarding appellant a recovery of the one hundred and forty-six dollars and forty-three cents sued for. The record was removed to the court below by a writ of *certiorari*, and, when the cause came on there to be heard, the judgment of the justice of the peace was affirmed.

Frank Boatner, for appellant.

None of the authorities cited by appellee is in point. Nothing cited by them justify or approach a justification of the unprecedented and unheard of action of the justice in rendering a judgment-over for a sum in excess of two hundred dollars.

On the other question, to wit: that the trial court should have ordered a trial *de novo* because the record before it did not show what judgment should have been entered, for the reason that there was no proof taken as to unliqui-

dated damages. We challenge the record in this case to show that the justice heard one word of proof as to damages. There is no such showing, and the court below held that no such showing was necessary. See written opinion of trial court, a part of record in this cause. There is a record showing that proof was heard as to the issue raised on the question as to whether the attachment was rightfully sued out. But that is all and there is nothing more on the question of proof.

The case of *Evans v. So. Ry.*, 74 Miss. 230, is decisive here. That was a case on all fours with the case at bar. The judgment there was all right except that it did not show that the justice whose judgment the trial court reviewed heard proof on the question of unliquidated damages. The case was reversed for trial *de novo* because the trial court could not tell what judgment should have been entered; no proof was taken by the justice, as disclosed by the record before the trial court. The same infirmities appear of record in this case. The trial court could not tell. It should have ordered a trial *de novo*. Its failure to do so is fatal.

There was an agreement to waive formal pleadings, according to the record. That agreement was kept, according to the same record. No formal pleadings were filed and no objection was urged or is now urged on that account. But there was no agreement to waive the right to sue out a writ of *certiorari*; neither was there any agreement to waive any other rights. So far as this record shows the justice of the peace, *sua sponte*, and without any demand therefor by any one, without taking proof thereof, without any suggestion that would warrant it, entered, arbitrarily a judgment for appellant for four hundred and twenty-five dollars. Does the record anywhere show his authority for this action? If so where? There is nothing in the record to show any warrant or authority for this judgment and the trial court erred when it failed to order a trial *de novo*, for which reason—if there was none other—the case should be reversed.

Howie & Howie, for appellant.

It is contended that the court had power to render judgment for four hundred and twenty-five dollars because of its incidental powers. What does this phrase mean? Let us examine it. A justice of the peace court is a court of limited jurisdiction. It has the limits of its powers specifically and definitely marked out for it in the laws of our state. It cannot exercise any powers outside of these limits. It can however exercise such powers as are necessary for the purpose of carrying into effect the granted powers. In "Words and Phrases" Vol. 4, 3494, we find this definition, to-wit,

"Incidental power is one that is necessary to the carrying into execution of a specifically granted power."

In another place it is defined as that which is "inseparably, or necessarily, incident to another."

The power exercised in the present case was not of this character. It was not necessary to the carrying into effect of any other power granted nor was it inseparably incident to the powers of the court which were otherwise to be exercised in this case. We have in our decisions numerous instances of incidental matters but in none is there any of the kind mentioned in this case. In *Jackson v. Whitfield*, 51 Miss. 202, interest on a note was held to be merely an incident to the main claim, the principle of the note, so was not such as would deprive the justice of the peace of jurisdiction. In *Higgins v. DeLoach*, 54 Miss. 498, a horse was replevied valued at one hundred and fifty dollars and certain other amounts were set up as damages for wrongfully detaining the horse, this last was held to be merely incidental to the amount of the value of the horse, which would not therefore cause it to be beyond the jurisdiction of the justice court. In *Martin v. Harvey*, 54 Miss. 685, it was held that the right to garnish, on a judgment in the circuit court on an appeal case, was incidental. In all of these it will be noted that matters which were held to be incidental were such

as were inseparable from the main controverted matter. In no instance could a separate suit have been maintained, for any of the things that were held to be incidental to the main issue or dispute.

The present case is a horse of quite another color. There they could not be separated; here they cannot be joined together but must be separately considered and determined. There, there was no right of action independently of the main claim by virtue of which jurisdiction was acquired; here the right of action is on a separate and distinct contract, the bond. The appellee could file suit in any court having jurisdiction on the bond. Having desired to claim more than two hundred dollars he should have gone to some other court than the justice of the peace court. Time and time again this has been held to be proper in our courts. *Buckley v. Van Diver*, 12 So. 905; *Shattuck v. Miller*, 50 Miss. 386; *State v. Luckey*, 51 Miss. 528.

The last two cases cited are very similar to the present case except that there the party went to the proper court. In the last the court went into the matter of what decided the jurisdiction very carefully. It held that the amount claimed under the bond was decisive. If the bond was for more than the claim, that the amount sought to be recovered was controlling. Here the amount sought, judging from the judgment rendered, was four hundred and twenty-five dollars. This is decisive, and places the controversy beyond the justice court.

"In actions on bonds the amount claimed, and not the penalty, determines the jurisdiction of the justices of the peace in the greater number of states. A justice of the peace has no jurisdiction unless the amount sued for is within his jurisdiction." 24 Cyc. pages 466 and 467.

In the present case we do not know what amount was claimed by the appellee, except that it was at least four hundred and twenty-five dollars. If it was more than that the principle would be the same. In fact we cannot understand any difference if he had claimed ten thou-

sand dollars or any other amount. By the principle above set out, which is almost universally recognized, the appellee should have filed his suit for damages in the circuit court and not in the justice of the peace court.

Furthermore the claim of the appellee by which he obtained judgment for four hundred and twenty-five dollars in the justice of the peace court was in the nature of a cross-action or counterclaim or more properly described as a setoff. Not only is it such by nature but is treated as such in our laws. Section 176 of the Mississippi Code of 1906, provides that a judgment for damages may be set-off as payment against the debt issue on which the suit was originally begun. A plea of payment is always considered as off-set. If suit has been begun and the defendant in any case desires to prove that the debt sued on has been paid then he must plead this as an off-set. See section 745, Code, and *Shelton v. Vanzant*, 40 Miss. 332, and *Casper v. Thigpen*, 48 Miss. 635, and especially, *Denney v. Wheelwright*, 60 Miss. 733.

Notice of set-off must be given in order to be availed of on trial of the case, section 746, Code 1906.

If then this claim would be in the nature of set-off and not only the amount of the judgment proper amounts to a greater sum than the court could take jurisdiction of, but the balance, after deducting the claim of the plaintiff, amounts to nearly one hundred dollars more than what the court could have had jurisdiction over, it seems absurd to think for a minute that the justice court could maintain jurisdiction. In this case, is not the judgment of the defendant for four hundred and twenty-five dollars pleaded, or considered as having been pleaded, as an off-set against the demand of the plaintiff? And does not the court render judgment against the plaintiff and his bond for the balance of the off-set over and above the demand of the plaintiff amounting to two hundred and seventy-eight dollars and forty-seven cents? It is well settled that a set-off cannot be pleaded if the balance

after deducting the claim of the plaintiff amounts to over two hundred dollars. We take it that this rule will not be questioned, so will cite only a few authorities. *Denny v. Wheelwright*, 60 Miss. 733; *First Howard*, Miss. 519; *General Electric Co. v. Williams*, 31 S. E. 288; *Robinet v. Nunn*, 9 Mo. 246; *The Lancaster Ohio Mfg. Co. v. Chas. Colgate*, 12 O. St. 344.

The circuit court had no jurisdiction unless the justice of the peace court had, in the first instance. "If the claim exceeds the jurisdictional amount and for that reason cannot be pleaded as set-off in the inferior court, an appellate court will not permit it to be pleaded as such on appeal from the lower court." 34 Cyc. page 647.

We submit therefore that the justice of the peace could in no wise take jurisdiction of the set-off because after deducting the demand of the plaintiff it still amounted to two hundred and seventy-eight dollars and forty-seven cents, which exceeded the jurisdictional amount for the justice of the peace court.

When an inferior court exceeds its jurisdictional limits or deviates from the rule of the statute relative to its method of proceeding, its judgments are void. *Stockett v. Nicholson*, Walker's Reports, page 75 *et seq.*

In the present case the justice court has not only attempted to adjudicate a matter which exceeded its jurisdiction, but has not followed any of the rules of procedure set out in the Code, which were made for the regulation and limitation of its proceedings.

We submit that this cause should be reversed and the judgment declared void and the claim of the appellee dismissed because it was beyond the jurisdiction of the justice of the peace court and for the further reason that no notice of the claim was ever filed nor any of the methods of procedure provided by law followed; and, if not correct in this, it must be reversed and new trial ordered in the circuit court.

R. L. Ward, A. H. Stephen and Rowe Hays, for appellee.

Answering the first contention of counsel for appellant that the judgment of the justice of the peace against appellant in the sum of four hundred and twenty-five dollars was void because it was in excess of the amount in which the justice of the peace had jurisdiction we cite the following authorities: *M. C. Higgins v. Thomas-G. DeLoach*, 54 Miss. 498; *Bell v. West Point*, 51 Miss. 262.

We take it as conclusive that the two cases cited above set at rest this contention, but we cite the following authorities: Constitution of Mississippi, section 171; *Glass v. Moss*, 1 *Howard*, 519; *Heggie v. Stone*, 70 Miss. 39; *Bernheimer & Sons v. Martin*, 66 Miss. 486; *Smith v. Newlon*, 62 Miss. 230; *Davis v. Holberg*, 59 Miss. 263; 24 *Cyc.* page 48; 24 *Cyc.* page 486 (paragraph G).

SMITH, C. J., delivered the opinion of the court.

(After stating the facts as above). The grounds upon which it is sought to have the judgment rendered by the justice of the peace reversed and the cause tried *de novo* are (1) the amount of damages awarded appellee is in excess of the jurisdiction of the justice of the peace; and (2) that "said judgment was for unliquidated damages and the record and the judgment do not show that proof as to the damages or the amount thereof was heard by said justice of the peace."

Appellee's claim for damages propounded in the court of the justice of the peace was not an original suit, but was a mere collateral matter, arising out of and resulting from the issue and levy of the attachment writ; and it is within the power of the legislature to confer upon courts "authority to determine all collateral matters that may arise in the progress of a cause over which they have constitutional jurisdiction." *Smith v. Newlon*, 62 Miss. 230; *Hunt v. Potter*, 58 Miss. 96.

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Brief for Appellants.

An inspection of the judgment also discloses that it was not upon default and without a writ of inquiry, but after the hearing of evidence upon the appearance of the parties by attorney.

Affirmed.

WALTON ET AL. v. WALL.

[70 South. 549.]

FORCIBLE ENTRY AND DETAINER. *Right to maintain action. Possession.*

A landlord who has leased his land for a term and placed his tenant in possession, cannot during the term maintain an action of unlawful entry and detainer, against a stranger who entered upon the premises after the term began.

APPEAL from the circuit court of Panola county.

HON. N. A. TAYLOR, Judge.

Action of unlawful entry and detainer by J. H. Walton and others against E. C. Wall. From a judgment for defendant, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

L. F. Rainwater, for appellants.

In the case of *Parker v. Eason*, 68 Miss. 290, Eason was in possession by his tenant, when Parker moved on the land and notified Eason's tenant to leave. Eason himself did not personally occupy the land. Eason brought suit, in an action of unlawful entry and detainer and recovered. In affirming the case CAMPBELL, Judge, says "The summary remedy by unlawful detainer is given by the Code for just such a case as this, among others where one claiming land invades the possession of another, and

seeks by this stratagem to secure possession to himself." It is impossible to conceive upon what theory the court below granted the peremptory instruction for defendant, unless it be that one of the witnesses for plaintiff testified that she had rented the land to one Bob Cleveland and having rented it that plaintiffs could not maintain the action. It will be noted that Cleveland had not been put in possession, and not being in possession he could not maintain the action. The suit was brought in February before the crop season began, and plaintiffs having agreed to rent to Cleveland were bound to put him in possession, and hence to bring this suit. A lessee who has not been put in possession cannot maintain the action of forcible entry and unlawful detainer. *Taylor v. Orlansky*, 92 Miss. 761.

I call the attention of the court to the language found on page 765 in the case cited above as follows: "The contention of counsel is simply that any one who has a right of possession by contract to a piece of land is entitled to bring this action of unlawful detainer under our statute. This is a manifest misconception."

Counsel for defendant in the court below relied upon the case of *Hammel v. Atkinson*, 82 Miss. 465, as authority for a peremptory instruction. That case correctly announces the rule to be that where a tenant is in possession, the landlord cannot maintain the action, in that case the court, PRICE, J., says; "Clarty (the tenant), was in possession of the land, making a crop," while in the case at bar there was no proof that the tenant was in possession, and, as a matter of fact was not in possession. The tenant therefore could not have maintained the action because in order to do so it must affirmatively appear that he has been deprived of the possession. 52 So. 705.

It was sought to establish in the court below that Wall, the defendant, in invading the possession of plaintiffs was acting as agent for W. H. Wall & Sons, and that the suit should have been brought against the latter. The only evidence tending to show an agency was the

testimony of Wall himself. Agency cannot be shown by the declaration of the agent and his statement has no probative value. *Sumrall v. Kitzelman*, 101 Miss. 790.

The invasion of plaintiffs' property by Wall was a tort, and in order to hold a principal liable for the tort of an agent, it must be by a previous authorization or an express ratification. *Tucker v. Jerris*, 75 Me. 184; *Smith v. Lozo*, 42 Mich. 6.

It can make no difference so far as plaintiffs are concerned whether Wall, in forcibly taking possession of their property, was in fact the agent of W. H. Wall & Sons or not. The plaintiffs had no information or knowledge that he was acting in any other capacity than his own.

I submit that as to plaintiffs right to recover the evidence is overwhelming; that the giving of the peremptory instruction for defendant was error; that the case should be reversed and judgment entered in this court for plaintiffs, but if I am mistaken in this, then the case should be reversed and remanded.

Shands & Montgomery, for appellee.

The record shows without dispute, that Bob Cleveland, a tenant of the appellants, was not only in possession of the *locus in quo* at the time of the institution of the suit, but had been in actual possession and occupancy of it, farming it, for two years immediately preceding. This was the third year that Bob occupied the premises. As stated in the opinion of the court, *Hamel v. Atkinson*, 82 Miss. 465, is conclusive of this case.

Cook, J., delivered the opinion of the court.

This is an action of unlawful entry and detainer instituted by the appellants against appellee, and resulted in a verdict and judgment against appellants by the peremptory direction of the court.

The record indisputably shows that the appellants, plaintiffs below, were not entitled to the relief sought, because it appears that they had rented the land in question to one Bob Cleveland, and that their tenant was in possession of the land at the time this suit was begun. In that regard the facts here are identical with the facts in *Hammel v. Atkinson*, 82 Miss. 465, 34 So. 225. It follows, therefore, that appellants were not entitled to the possession of this land.

We put to one side all other questions presented by the record, and merely decide that the judgment below will be affirmed, as this case is ruled by the case cited.

Affirmed.

HOLLOMAN v. LINDSEY ET AL.

[70 South. 81.]

BROKERS. Purchasers.

Where appellant sued, by attachment in chancery for breach of contract to convey him certain land, and demanded a decree for the difference between the price he claimed he contracted to pay appellee, and the price at which he had entered into a contract to resell it to third parties, the court held that under the facts as shown in the opinion of the court appellant was a purchaser and not an agent and was entitled to recover the amount sued for.

APPEAL from the chancery court of Yazoo county.

HON. P. Z. JONES, Chancellor.

Suit by Leon C. Holloman against Eliza W. Lindsey and others. From a decree for defendant, complainant appeals.

The facts are fully stated in the opinion of the court.

E. L. Brown and J. B. Harris, for appellant.

King, Brower & Hurbut and Barnett & Perrin, for appellee.

STEVENS, J., delivered the opinion of the court.

This is an attachment in chancery, instituted by appellant; as complainant in the court below, against appellees, nonresident owners of certain lands, situated in Yazoo county, known as the "Walker Plantation." Appellant sued for breach of contract to convey the land to him, and demanded decree for three thousand, five hundred and ninety-six dollars, the difference between the price he says he contracted to pay appellees and the price at which he had entered into a contract to resell to Messrs. Davis and Gunter. The attachment was duly issued and levied upon the lands in question, and thereafter appellees executed a bond agreeing to pay and satisfy any decree that the chancery court of Yazoo county or the supreme court might render against them, and the attachment was thereby discharged. The case was heard on bill, answer, and depositions, and a decree rendered by the chancellor, denying appellant any relief and dismissing the bill. The contract in question is between appellant and one H. W. Rodgers, residing in Chicago and alleged agent of appellees, and the contract is evidenced by letters and telegrams, there being no personal interview between the parties whatever.

It is the contention of appellant that he entered into a contract to purchase and stands in an attitude of purchaser, while appellees contend that appellant was their agent in effecting the sale of the plantation. The answer contends, not only that appellant was an agent, but that H. W. Rodgers had no authority in writing to bind appellees, owners of the land, who are scattered from Massachusetts to California. January 12, 1911, appellant wrote Mr. Rodgers at Chicago, stating that he understood Rodgers owned or had control of this property, and stating:

"If this land is for sale, I would be pleased to have your best price on the same with description of the place."

January 27th Rodgers replied, among other things:

"I am holding the land as per description and tracing of map herewith at \$6 per acre."

March 15, 1911, appellant wrote another letter, commenting on the boll weevil and other adverse conditions, and saying:

"If you will let an option for ninety days, I will give you fifty dollars for same."

Mr. Rodgers, March 24th, took issue with Holloman on the boll weevil being so much a terror, boosted the value of the place, and wound up his letter by saying he would be glad to hear from appellant any "proposition you may have to offer." May 6th following appellant in another letter asked for an exclusive option, and for Mr. Rodgers to name the "very lowest price net to you," and "I believe I can soon find a buyer." In response, May 8th, Rodgers says:

"I am not prepared to give you an option on the land. . . . The price I named you is the very lowest I would accept, viz., six dollars per acre net to you. You would have to get your commission elsewhere," etc.

June 5th Mr. Holloman expressed regret that he could not obtain a full option, and stating he had given Messrs. Galloway & Co., Jackson, Miss., and a great many other parties, a description of the land, that Galloway & Co. had shown the land to Dr. Davis and Mr. F. E. Gunter, of Jackson, Miss., and asked Mr. Rodgers, if he should hear from the latter other than through appellant, to refer them back to appellant. Mr. Rodgers responded, June 8th, stating he would refer the parties named back to appellant. It appears that Mr. Holloman had asked Mr. Galloway to assist in showing and selling the lands in question and that when Messrs. Davis and Gunter looked over the place they expressed a willingness to buy at

twenty-one thousand and ninety-six dollars. After Mr. Holloman ascertained that Dr. Davis and Mr. Gunter would likely buy, he telegraphed, June 15th, Mr. Rodgers:

"Have cash offer for fifteen thousand dollars for Walker plantation. Will you accept? Answer."

To which Rodgers responded:

"Will not sell Walker plantation for fifteen thousand dollars."

June 16th, later, Mr. Holloman wired:

"Let me know the best cash you will do. Party leaves to-morrow. Act quick."

To which Rodgers responded:

"Twenty-one thousand dollars net, subject to confirmation by owners and agreement as to lease and title."

June 16th Holloman entered into a contract himself to sell and convey to Davis and Gunter at twenty-one thousand and ninety-six dollars, but proceeded in his attempt to hammer down the price, and several telegrams followed, making counter propositions one to the other, resulting in the telegram of the 18th by Rodgers to appellant, offering to accept seventeen thousand and five hundred dollars "net to me," and to this proposition Holloman wired acceptance.

Appellees thereafter ascertained through Dr. Davis that he was buying from Holloman at twenty-one thousand and ninety-six dollars, and on discovery of this fact Mr. Rodgers wired Holloman there were obstacles in the way of a trade, and asking Holloman to come to Chicago for a personal conference. On Holloman arriving in Chicago, Mr. Rodgers advised him that he did not know he was making such a profit out of the land, charged appellant with being agent, and not purchaser, and after further correspondence between Rodgers and the owners, the latter, through Rodgers, their agent, declined to convey the land to Holloman, but after the institution of this suit proceeded to close the deal with Messrs. Davis and Gunter. By correspondence beforehand, appellant had asked that the deed be made to him and sent to a bank

in Jackson, Miss., with sight draft upon him for the amount of the purchase price, and agreed to honor the draft when the title to the land had been approved by Messrs. Watkins & Watkins, attorneys. June 21st appellant wrote Rodgers, saying:

"Inclosed find deed drawn in favor of myself for what is known as the Walker plantation in Yazoo county, state of Mississippi. . . . Make draft on me for seventeen thousand and five hundred dollars, attach deed to draft, and forward papers to the Jackson Bank, . . . Upon the approval by Messrs. Watkins & Watkins of this deed and abstract, which I now am drawing, I will pay the the draft."

In a letter of June 23d Mr. Rodgers says:

"In sending deed to the Jackson Bank to close this deal, if that be the final agreement, we should, of course, be willing to have the papers submitted to Watkins & Watkins or other attorneys you may mention; but such examination, of course, would have to be at your personal expense."

In letter of June 27th Rodgers agreed "to divide the rental for 1911, . . . to pay one-half of general taxes for 1911 upon presentation of bill for same to me, and to pay on account of the bill for abstract work and attorney's fees not to exceed the sum of seventy-five dollars," and further stating:

"My lawyer further reports that he cannot grasp your point as to possible advantage a purchaser from you might obtain in case you divided the tract into several pieces."

June 28th appellant, by letter to Rodgers, among other things, says:

"Yours of the 27th relative to the sale of the Walker plantation to hand, and accepted as definite and final. . . . I inclose the deed herewith."

Many letters and telegrams between Mr. Rodgers and the owners of the land appear as exhibits to the depositions; and, without setting them out in detail, we think

the authority in writing of Mr. Rodgers to sell the lands is sufficiently shown.

It is contended by appellees that appellant is guilty of such fraud as places him in the attitude of coming into equity with unclean hands. The dealings between the parties hereto are all reflected by the correspondence, which we have carefully read and considered. The correspondence, in our judgment, does not constitute appellant an agent. H. W. Rodgers in his deposition admits:

It was not the amount of money he received or was to receive for the property that we object to, but the manner in which he obtained it or would have obtained it.

. . . I did not think that seventeen thousand and five hundred dollars was all the property was selling for. I presumed he was getting his commissions."

While the correspondence and dealings between the parties indicate that appellant was buying for purposes of resale, and that appellees well knew that appellant was attempting himself to buy the property and immediately resell it, this fact does not constitute appellant in any sense of the word an agent. The final contract and the very deed agreed upon constituted appellant a vendee, with all the obligations and rights of a purchaser. The record shows correspondence with reference to the title to a few acres of the land in question, and an agreement on the part of the appellant to accept a quit-claim deed to a portion of the land. The deed itself constitutes appellant a vendee, and a sight draft for the purchase price was to be drawn upon him. If this sale had been consummated, appellant could not have been heard to say that he was not the purchaser, and upon any breach of warranty of the title, or upon any controversy between the parties hereto growing out of the transaction in question, appellees could not have been heard to say they were not the vendors. If Holloman, therefore, was a purchaser and vendee, he could not be an agent, and as such agent charged with the duty of disclosing to appellees details of his proposed trade with Messrs. Davis and Gunter, or

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the profit he was making. Mr. Rodgers, with whom all the correspondence was had, was himself an agent for the owners of the property, and at the very time he and appellant were negotiating their sale one with the other Mr. Rodgers was representing that the owners would not take less than \$6 per acre, while as a matter of fact he had been authorized to sell at a price within his discretion between twelve thousand dollars and fifteen thousand dollars.

We are not called upon to pass judgment upon the propriety of any representation made, either by Mr. Rodgers or by Mr. Holloman, one to the other, or upon the trading ethics of either. It must be conceded that Rodgers was puffing his property, while appellant in various ways was pulling down the price. Appellant asked for an option for a limited time, and failed to get it. He asked for the exclusive right to handle the property, and failed to get any such contract. To all his propositions Mr. Rodgers responded that he had employed no one to handle the property, but would be glad to entertain any proposition appellant might see fit to make, the price always to be net to appellees. Properly construed, he was persistently and consistently saying to appellant:

"I have this property for sale, and want so much money for it. I do not care to give you or any one else an option or contract to handle it; but, if you have any propositions to purchase, I am ready to entertain them, and I stand ready to convey this property to you, or to any one you designate, at so much money net to the owners."

As a matter of fact, the real owners were getting more than they expected, appellant was making a good profit, and Messrs. Davis and Gunter were completely satisfied to pay the top price. Upon the undisputed testimony, the correspondence, and the actual dealings of the parties as reflected by the record, we think the decree of the court below should have been in favor of appellant, and the cause is therefore reversed, and decree here for appellant.

Reversed.

NEWMAN v. SUPREME LODGE, KNIGHTS OF PYTHIAS.

[70 South. 241.]

1. INSURANCE. *Fraternal association. Laws. Amendment. Contract. Construction. Assessments. Increase.*

A fraternal association or corporation, under the reserve power to amend its laws, whether the power be reserved in the constitution and laws or in the contract with its members, may so amend its law as to bind its members and affect their pre-existing contracts, provided the amendment be reasonable, does not impair vested rights, or radically alter its contracts with its members.

2. INSURANCE. *Mutual association. Contract.*

It is well established under the rule that it is competent for parties to contract with reference to existing or future laws and that, when application for membership in a mutual benefit association has been made, and a certificate of insurance from the association is issued to the applicant, the constitution, by-laws, application and certificate, all together, constitute the contract.

3. CONTRACTS. *Construction.*

In order to determine the true meaning of a contract, the facts must be kept in view and the contract, in its entirety, must be construed in accordance with established rules of law.

4. INSURANCE. *Fraternal association. Assessments. Increase.*

Where a fraternal association had the reserve power to amend its constitution and laws, and its laws designated the rate of assessments of its members, and provided that they should continue to pay the same amount as long as they remained a member, unless otherwise provided for by the supreme lodge of the organization, and the member agreed to pay all assessments for which he may become liable; and that he would be governed, and his contract should be controlled by all the laws then in force or that might thereafter be enacted; and that the certificate of insurance which he accepted was made dependent upon his payment of all assessments "as required," and his full compliance with laws that might be thereafter enacted. In such case an increase in a member's rate of assessment by the supreme lodge was valid and binding on him, as being within the scope of his contract.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Carl Newman against the Supreme Lodge, Knights of Pythias. From a judgment overruling a demurrer to defendant's plea, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Whitfield & Whitfield and *Flowers & Brown*, for appellant.

Watkins & Watkins and *Watson & Esarey*, for appellee.

CAMPBELL, Special Judge, delivered the opinion of the court.

Appellee is a corporation organized under an act of Congress, having a lodge system, a ritual, and a representative form of government. It is of that class commonly known as a mutual, fraternal, and benefit association. In 1877, it created an endowment rank, in which certificates of insurance were issued on the lives of its members for the benefit of their families, relatives, or other persons dependent upon them. The endowment rank was subdivided into sections, one of which was in Chicago, in the state of Illinois. In 1890, Carl Newman, the appellant, being then forty-six years of age, applied for membership, and obtained a certificate of insurance on his life as a member of the section of the rank located in Chicago. His certificate of insurance obligated the rank to pay his widow, upon his death, one thousand dollars. The fund for paying the certificates of insurance issued by the rank to its members was derived from monthly assessments of the members. The act of Congress under which appellee organized provided that it should have a constitution, and should have the power to amend the same, and its constitution and laws provided that the same "may be altered or amended at any regular meeting of the Supreme Lodge by a two-thirds vote." At

the time appellant applied for membership and received his certificate of insurance, section 1 of article 4 of appelle's constitution and laws was as follows:

"Each member of the endowment rank, shall, on presenting himself for obligation, to pay to the secretary of the section, in accordance with his age and the amount of endowment applied for, a monthly assessment, as provided in the following table, and shall continue to pay the same amount each month thereafter as long as he remains a member of the endowment rank; unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World."

Subjoined to this section 1 was a table, giving the amounts of the monthly assessment per one thousand dollars according to age, running from the age of twenty-one to fifty, both inclusive; and the amount of the monthly assessment therein designated for one forty-six years of age (appellant's age when he became a member) was one dollar and forty cents per one thousand dollars of insurance. Appellant's application for membership contained the following stipulation:

"I hereby agree that I will punctually pay all dues and assessments for which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, or submit to the penalties therein contained, to all of which I willingly and freely subscribe."

His certificate of insurance, issued in pursuance of said application, contained the following stipulation: "In consideration of the payment hereafter to said endowment rank of all assessments and dues as required, and the full compliance with all the laws governing this rank now in force, or that may hereafter be enacted by the Supreme Lodge, Knights of Pythias of the World, and shall be in good standing under said laws," the insurance therein provided for should be paid by the board of control of the

endowment rank of Knights of Pythias of the World to his beneficiary therein named; and underneath that certificate was the following provision: "I hereby accept this certificate of membership subject to all conditions therein contained"—which he signed. Appellant paid his monthly assessment of one dollar and forty cents until 1894, when the monthly assessment was raised to one dollar and forty-five cents, and this he paid until 1901, when the monthly assessment was again raised to two dollars and twenty-five cents, and this he paid until January, 1911, having, in the meantime, paid some special assessments of the same amount. He acquiesced in these raises of his assessment, as he alleges in his declaration, because they were small in amount. In the latter part of 1910, the monthly assessment of the class to which appellant belonged was again raised from two dollars and twenty-five cents to seven dollars and thirty-five cents, and this latter amount he refused to pay, claiming that the same was arbitrary, and in violation of appellee's contract with him; and, as a result of this latter increase of the monthly assessment, he brought this suit to recover from the appellee all money that he had paid into the rank on account of his insurance, alleging, in substance, that, in making said increase of the monthly assessment, appellee had breached its contract with him, made at the time he became a member of said endowment rank. To appellant's declaration, appellee interposed a special plea, wherein it set forth its history, the acts of Congress under which it was organized, its constitution and by-laws, making them exhibits to its plea, claiming the right, under its constitution and by-laws and its contract with appellant, to increase the monthly assessments, as was done, and averred facts tending to show that said increase of the monthly assessment was necessary for the good of the rank, and was to enable it to carry out its contracts with its various members, in view of the great number of deaths and the impossibility, from its assets and low rate of assessment theretofore prevailing, of meeting its ob-

ligations to its members, and that it had no other motive or purpose in raising the assessments. Plaintiff (appellant here), interposed a demurrer to the plea, assigning various grounds, all of which, in effect, involved the contention that the increase of the assessments complained of was in violation of his contract. The demurrer was overruled, and, plaintiff declining to plead further, final judgment was rendered for the defendant (appellee here): Hence this appeal.

The single question for our determination, in this case, is whether or not the amendment of its laws, adopted by appellee, effective January 1, 1911, whereby the rate of monthly assessments of its members was increased, was valid and binding upon appellant, the general power to amend its constitution and laws having been therein reserved, and appellant, in his application for membership, having agreed that he would be governed, and his contract should be controlled, by laws then in force or that might thereafter be enacted, and the certificate of insurance issued to him providing that he should comply with all the laws then in force or that might thereafter be enacted. There is no claim that said amendment was not adopted in accordance with appellee's laws; but the claim is that it impaired appellant's vested rights and materially affected his contract, and was, for that reason, invalid. We are not disposed to lengthen this opinion by reviewing, or even citing, the great number of cases in which the power of a mutual benefit association or corporation to amend its laws has been considered. The rule is well established that such an association or corporation, under the reserve power to amend its laws, whether the power be reserved in the constitutions and laws or in its contracts with its members, may so amend its laws as to bind its members and affect their pre-existing contracts, provided the amendment be reasonable, does not impair vested rights, or radically alter its contracts with its members. As to what is a reasonable amendment, or an impairment of vested rights, or to what extent the amend-

ment may alter pre-existing contracts, the decisions are in direct conflict.

It is also well established under the rule that it is entirely competent for parties to contract with reference to existing or future laws, and that, when application for membership in a mutual benefit association has been made, and a certificate of insurance from the association is issued to the applicant, the constitution, by-laws, application and certificate, all together, constitute the contract. This court in *Woodmen, etc., v. Woodruff*, 80 Miss. 546, 32 So. 4, made this statement of the rule:

"The constitution and laws of a benefit society are binding upon it and upon all of its members, and may be considered as written into contracts between it and its members; and all amendments or changes made in the constitution and laws of the order become at once the law of the order and of its members, and take the place and stead of the laws amended or changed, and thereafter govern the rights and liabilities of the order and of its members in relation to all contracts between them."

Having stated these general rules, we now proceed to consider the particular question in this case, limiting our opinion, as far as practicable, to a review of those decisions which have considered the question of raising assessments in a mutual benefit association or corporation; and, as to that question, there is conflict in the decisions. The following cases cited by appellee's counsel uphold the validity of an amendment of the laws of a mutual benefit association increasing the rate of assessments of its members: *Fullenwider v. Supreme Council*, 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; *Supreme Lodge, K. of P.*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Moore v. Life Annuity Ass'n*, 93 Kan. 398, 148 Pac. 981; *Reynolds v. Royal Arcanum*, 192 Mass. 150, 78 N. E. 129, 7 L. R. A. (N. S.) 1154, 7 Ann. Cas. 776; *Williams v. Supreme Council*, 152 Mich. 1, 115 N. W. 1060; *Conner v. Supreme Commandery*, 117 Tenn. 549, 97 S. W. 306; *Supreme Lodge K. of H., v. Bieler* (Ind. App.), 105 N. E.

244; *Clarkson & Miller v. Supreme Lodge, K. of P.*, 99 S. C. 134, 82 S. E. 1043; *Thomas v. Knights of Maccabees of the World* (Wash.), 149 Pac. 7; *Gaut v. Mutual Reserve Fund Life Ass'n* (C. C.), 121 Fed. 403. On the other hand, the following cases cited by appellant's counsel deny the validity of such an amendment: *Dowdall v. Supreme Council*, 196 N. Y. 405, 89 N. E. 1075, 31 L. R. A. (N. S.) 417; *Wright v. Knights of Maccabees of the World*, 196 N. Y. 391, 89 N. E. 1078, 31 L. R. A. (N. S.) 423, 134 Am. St. Rep. 838; *Green v. Royal Arcanum* (Sup.), 124 N. Y. Supp. 398—(all New York cases); *Smythe v. Supreme Lodge, K. of P.* (D. C.), 198 Fed. 967; *Pearson v. Knights Templars, etc.*, 114 Mo. App. 283, 89 S. W. 588; *Ericson v. Fraternal, etc.*, 105 Tex. 170, 14 S. W. 160. The cases upholding the validity of such an amendment affirm that, where the power to amend its constitution and laws is reserved by a mutual benefit association, and a member agrees, in his contract with the association, to comply with, or abide by, its laws then existing, or that thereafter may be adopted, an amendment, increasing the rate of assessments adopted in regular order, subsequent to the contract, is not an impairment of vested rights of a member, nor an unlawful alteration of his contract. On the other hand, the cases cited by appellant's counsel, while not denying the right of a member of a mutual benefit association to contract with reference to future laws, construe the reservation in its constitution and laws of the power to amend, and an agreement on the part of its members to comply with, or abide by, future laws as authorizing only such amendments as relate to the organization generally, its forms and methods of business, and the conduct of its members as such; that where the rate of assessments is fixed in its laws, and a certificate of insurance is issued to, and accepted by, a member—the rate being specified and the benefits being specified—to authorize an increase in the rate of assessments, the authority must be specified in the certificate itself, and that an agreement therein merely to comply with, or abide by,

future laws or amendments is not sufficiently specific to authorize an increase in the rate of assessments. In the Dowdall Case, the certificate of insurance contained this stipulation:

“This certificate is issued upon the express condition that the said Michael Dowdall shall, in every particular while a member of said association, comply with all the laws, rules, and requirements thereof.”

—and the court said that there was no reference here to any future laws or amendments. Furthermore, in that case, the laws of the association provided that “all members should be assessed according to their age, when admitted.” In the Wright Case, the certificate of insurance provided for payment upon condition that “he shall have, in every particular, complied with the laws of the order in force or that may hereafter be adopted,” and, the opinion recites that:

“It was further agreed that ‘he shall pay the same rate of assessment thereafter so long as he remains continually in good standing in the order.’”

Furthermore, the amendments in that case not only increased the assessments, but materially decreased the benefits provided for in the certificate of insurance. The opinion recites that:

“While the member is now required to pay more than twice as much as before, he is to receive in return materially less than before. He is deprived altogether of the benefit to which he was entitled upon reaching the age of seventy, and is deprived of a material part of the benefit to which he was entitled in case of disability. While it was specifically provided that he should ‘pay at the same rate of assessment thereafter,’ the rate of assessment is now more than double. The benefits were specified and the rate was specified, and can such a contract of insurance be so amended by the insurer, under a general power, as to take away from the insured, without his consent, an essential part of what he specifically contracted for?”

After reciting several cases holding that, under a general power to amend, benefits provided for in the contract cannot be cut down or reduced, and holding that those cases control, so far as the amendments in question were concerned, except the one providing for an increase in the rate of assessments, the opinion proceeds to state that:

"Following the authorities cited, we hold that the amendments which assume to cut down the benefits to which the plaintiff became entitled by his contract with the defendant are void and of no effect."

Having said that, the judge delivering the opinion then said:

"I am, personally, of the opinion that the amendment increasing the rate of assessment is also void, for I can see no difference in principle between reducing benefits and increasing the amount to be paid for benefits."

From those excerpts from the opinion in that case, it is evident to our minds that what was said regarding the amendment increasing the rate of assessment was the view of the judge who delivered the opinion, and not of the court.

The Green Case, also a New York case, reannounced the doctrine, as established by former rulings in that state, that a general power to amend the laws of a mutual benefit association, reserved in its constitution and laws, or agreed to by its members, does not authorize an amendment increasing the rate of assessment or otherwise affecting the member's contract, with the association. The same is true as to the Pearson Case from Missouri, and the Ericson Case from Texas. The Smythe Case, cited by appellant's counsel, arose in a federal district court of New York, and the appellee in that case was the same as the appellee in the case at bar; but the laws of the association involved in that case were those adopted in 1886, whereas the laws of 1888 are the laws involved in the case before us. The laws of the association involved in that case, after providing that the applicant for membership should, at the time of making his application, pay

a monthly assessment, as designated in the subjoined table, further provided that he "shall continue to pay the same amount each month thereafter as long as he remains a member of the endowment rank;" and, at the time Smythe became a member, a printed statement was delivered to him, containing, among other things, this stipulation:

"The system of the endowment rank is based upon actual cost of insurance during expectancy of life, divided, for convenience, into . . . monthly payments during the life of the applicant, in accordance with his age at date of applying for membership. These payments do not increase with increasing age, but always remain the same during good standing of the member."

The court held that, with such representations as those, contained in the laws of the association, and the printed statement given to Smythe, his agreement to be governed, and that his contract should be controlled, by the laws in force, or those that may be thereafter enacted, was not sufficiently definite to authorize an amendment, increasing the rate of his assessments. So in the Dowdall Case, the Wright Case, and the Smythe Case, it was provided in the laws of the association, or was agreed to, or represented by the association, in effect, that the rate of assessments should remain unchanged, and the court in those cases treated the same as a part of the contract, which could not be altered, under a general power to amend or an agreement to comply with, or abide by, the laws then in force, or that may be thereafter adopted. On the other hand, the Fullenwider Case, the Williams Case, the Conner Case, and the Thomas Case, *ubi supra*, had under consideration a by-law, in effect, providing that the rate of assessments should remain the same. Nevertheless the court, in those cases, sustained the validity of an amendment, increasing the rate of assessments, under an agreement, on the part of the member to comply with, or abide by, the laws then in force, or that might be thereafter adopted.

We are not called upon, in this case, to decide whether or not an amendment increasing the rate of assessments, under a general power to amend, reserved in the constitution and laws of a mutual benefit association, or in its contract with its members, is valid, where its existing laws, or its contract, stipulated that the rate of assessments should remain unchanged, since there was no such stipulation in appellee's laws, or in its contract with appellant, as presented in this case. The power to amend its laws was reserved by appellee in its constitution and laws, at the time appellant became a member. Section 1 of article 4 of its laws, at that time, designating the rate of monthly assessments of its members, which, for one of appellant's then age, was one dollar and forty cents per one thousand dollars, provided, that the applicant for membership, at the time of making application, should pay—

“a monthly assessment as provided therein, and shall continue to pay the same amount each month thereafter as long as he remains a member of the endowment rank, unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World.”

In his application, he agreed to pay all assessments for which he “may become liable,” and that he would be governed, and that his contract should be controlled by all the laws, rules, and regulations of the order governing the rank then in force, or that may thereafter be enacted; and the certificate of insurance issued to, and accepted by, him promised payment of the amount thereof in consideration of his payment of all of the assessments “as required,” and full compliance with all of the laws governing the rank then in force, or that might be thereafter enacted.

In applying the law to this case, as in every case, the facts must be kept in view, and the contract, in its entirety, must be construed in accordance with established rules of law, with the view of determining the true meaning of the contract. The conflict between the line of cases

cited by counsel for appellee and those cited by counsel for appellant, on the point in question, as we view them, arises from the fact that one line attaches a different meaning to substantially the same terms of the contract from that given by the other.

Whether or not, in a contract between a mutual benefit association and one of its members, the recitation therein of such general language as that "he shall comply with, or abide by, all laws then in force, or that may be thereafter enacted by the association," is sufficiently definite to authorize such reasonable changes in its laws as may affect the contract, or only such amendments as relate to the organization generally, its forms and methods of business, and his duties as a member, we need not decide.

As stated, the authorities hereinbefore mentioned, as cited by appellee's counsel, under such general language in the contract, and laws of the association, sustain the validity of an amendment increasing the rate of assessments of members of mutual benefit associations, and hold that the same does not impair any vested right, nor materially alter the member's contract beyond what was authorized. Without committing ourselves to an unqualified approval of the rule announced in those cases on the facts involved, we do decide that, as applied to the facts of this case, we approve the rule which they announce.

When we consider the facts in this case—that appellee had the reserved power to amend its constitution and laws; that its laws designated the rate of assessments of its members, and provided that they should continue to pay the same amount as long as they remained a member, "unless otherwise provided for by the Supreme Lodge, Knights of Pythias of the World;" that appellant agreed to pay all assessments for which he "may become liable;" that he would be governed, and his contract should be controlled by all the laws then in force, or that might thereafter be enacted; and that the certi-

ficate of insurance which he accepted was made dependent upon his payment of all the assessments "as required," and his full compliance with laws that might be thereafter enacted—we have no hesitation in deciding that the amendment in question, increasing appellant's rate of assessment, was valid and binding on him, as being within the scope of his contract.

If it be understood that the rule announced in the cases cited by appellant's counsel condemns the amendment in question, even when applied to the facts as they are in this case, then we unhesitatingly disapprove of that rule. All of those cases, we think, clearly recognize the rule that it is entirely competent for a member of a mutual benefit association to contract with reference to its future laws, but hold that, in order that future laws may affect the contract, the contract itself must distinctly specify or indicate the nature of the future laws; otherwise the contract should be construed as relating only to such future laws as apply to the government of the association, its forms and methods of business, and the conduct and duties of its members as members. We cannot apply that construction to appellant's contract; for, leaving out of view other provisions in the contract and laws of the association, he agreed in his application for membership that he would be governed, and that his contract should be controlled, by laws then in force, or that might thereafter be enacted. In that, we find two clauses—one referring to himself as a member, and the other to his contract—both of which should be governed or controlled by all laws that might be thereafter enacted. If he had intended to limit the future laws that might be enacted to such as should affect him only in his relationship as a member of the association, he should not have agreed that his contract should be controlled by future laws.

We recognize the dual relationship which appellant bore to the association—that of insurer and the insured—as pointed out in *Reynolds v. Royal Arcanum*, *Williams v. Supreme Council*, etc., and *Thomas v. Knights*

of Maccabees, etc., ubi supra, and the reasoning in those cases, showing the distinction between a law which affects the obligation of the association to a member, as the insured, and one which affects so much of his contract with the association as relate to his duties as insurer, and we approve the reasoning and conclusion reached in those cases.

For the reasons herein stated, the judgment of the court below is affirmed.

Affirmed.

ALLEN *et al* v. STATE.

[70 South. 362.]

BAIL. Bonds. Liability. Statutes.

Under Code 1906, section 1466, providing that all bonds or recognizances, conditioned for the appearance of any party in any state case or criminal proceedings, which shall free such party from jail, shall be valid, and under section 1467, providing that all bonds and recognizances in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer such offense, and shall be valid until he is discharged by the court, where defendant's principal was charged with feloniously and knowingly receiving stolen goods, while the bond bound him to appear and answer a charge of receiving stolen goods. In such case if the principal was released, the bond was effective, and the sureties could not escape liability on the ground that the offense described in the bond was different from that charged in the indictment.

APPEAL from the circuit court of Leflore county.

HON. MONROE McCLURE, Judge.

Scire facias by the state against Silas Allen and others. From a judgment for the state, defendant appealed.

The appellant was indicted in the circuit court on a charge of having received certain stolen property, which he knew had been stolen. He entered a plea of not guilty, and gave bond in the sum of one hundred dollars to appear at the next term of the circuit court, and his cause was continued. The indictment charges that he knew the property had been stolen, and that he "unlawfully and feloniously" received same. His appearance bond binds him to appear and answer "a charge of receiving stolen goods." When the case was called for trial he did not appear upon being called into court, and judgment *nisi* was entered against his sureties, said judgment reciting that he had failed to appear and answer "a charge of receiving stolen goods." A *scire facias* was issued on the forfeited bond, which recited that appellant had failed to appear and answer the charge of "knowingly and feloniously receiving stolen goods." Judgment final was rendered against the sureties, and an appeal granted to the supreme court.

It is urged that the appearance bond and judgment *nisi* differed in their terms from the indictment, and the *scire facias*, since the words "knowingly and feloniously" were omitted, and it is also charged that the court erred in admitting the indictment in evidence upon the hearing of the cause at the time judgment final was entered.

Sections 1466 and 1467 of the Code are as follows:

"1466. All bonds, recognizances, or acknowledgments of indebtedness, conditioned for the appearance of any party before any court or officer, in any state case or criminal proceeding, which shall have the effect to free such party from jail or legal custody of any sort, shall be valid and bind the party and his sureties, according to the condition of such bond, recognizance, or acknowledgment, whether it was taken by the proper officer or

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under circumstances authorized by law or not, or whether the officer's return identify it or not.

"1467. All bonds and recognizances taken in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer to such offense as he may have actually committed, and shall be valid for that purpose, until he be discharged by the court."

S. R. Coleman, for appellant.

The bond executed by Allen and his sureties was for his appearance to answer the charge of receiving stolen goods, a charge of no crime known to law. A forfeiture was taken on said bond and judgment *nisi* states that he was called to answer the charge of receiving stolen goods, made default, and therefore judgment *nisi* against him and his sureties for his default in not appearing to answer said charge. There is a fatal variance between the *alias scire facias* upon which judgment final was rendered and said judgment *nisi* and the amended *scire facias*, like its predecessor, should have been quashed.

The bond and judgment *nisi* both are to answer, and for failure to answer the charge of receiving stolen goods, which is not a crime, and the *alias scire facias* says for failure to answer the charge of knowingly and feloniously receiving stolen goods. This is a material variance that all the authorities in the Mississippi Reports from 4th. Howard on up and including 76 Mississippi, hold to be fatal to a *scire facias*. (See Annotations to sec. 1468, Code 1906.)

The indictment introduced on the hearing of the plea of "*nul tiel record*" was no part of the record, legitimately or otherwise. The *scire facias*, was based on the judgment *nisi*, and not on an indictment, and the evidence should have been confined to the record and that alone as pleaded and denied.

George H. Ethridge, Assistant Attorney-General, for State.

The bond given by the appellant,* Silas Allen, merely described the offense as being for receiving stolen goods, and under section 1467 of the Code of 1906, it is provided that such bond is good whether it actually describes the offense or not, and under section 1468 of the Code it is provided that if the defendant in such case as the one at bar, fails to comply with the terms of his bond, the court may at any time have default made, enter judgment against the obligor and his sureties in the bond or recognizances, and thereupon a *scire facias* shall issue returnable next term of the court and that the judgment may be made absolute of such *scire facias* unless a sufficient showing is made to the contrary at the time the case is called in its regular order on the docket.

I submit that under these statutes the proceedings were sufficient. There was no sufficient showing made for a failure to appear and answer the charge. Indeed there was no showing whatever made as to any reason excusing such default and the judgment *nisi* was entirely void. It is sufficient for the judgment *nisi* to follow the recitals of the bond. If the statute 1467 writes into the bond the proper recitals, it would also carry the same meaning into the judgment. Following the term of the bond it affirmatively appears that the indictment was introduced in evidence and it shows what the real offense was, and there is no harm that can come to the sureties by reason of the recitals of the judgment. The entire record of the circuit court was put in evidence by the district attorney and showed a complete charge of a valid offense and the failure to appear. The same result would be obtained if the indictment had not been introduced, because the court would take judicial knowledge of the facts therein.

In the case of *Smith et al. v. State*, 38 So. 335, was a case where the party was bound over to answer a charge

of robbery but was indicted on a charge of grand larceny and the principal in said bail bond having failed to appear to answer the indictment; judgment was taken against his bondsmen. He set up a similar contention as to liability as the one presented in this case, and the supreme court spoke through the then Chief Justice, disposed of the matter very summarily and held that sections 1466 and 1467 of the Code shut off such defense. I think the contention here made is a technical one, and that the trial court reached the correct conclusion and result and that the judgment there rendered should be affirmed.

Cook, J., delivered the opinion of the court.

This case is ruled by *Smith v. State*, 38 So. 335, and will therefore be affirmed.

Affirmed.

HILL v. JACKSON LIGHT & TRACTION Co.

[70 South. 401.]

1. CARRIERS. *Injury to passengers. Directing verdict. Evidence. Injury to others. Manner of injury. Opinions. Electricity.*

Where, under the evidence, it was a question for the jury as to whether plaintiff, a passenger, received a shock on the burning off of the last of four wires carrying the current in a street car of defendant, the other three wires having previously broken, and where it was impossible to say as a matter of law that no inference of negligence was to be drawn from the absence of inspection of such wires for several months before the accident, it was error to give a peremptory instruction for the defendant, since under Laws 1912, chapter 215, the

receiving of an injury from the running of a car was *prima facie* evidence of negligence on the part of the carrier.

2. CARRIERS. *Passengers. Evidence. Injury to others.*

Evidence of other shocks received by other passengers on other occasions while riding in the car in which plaintiff was a passenger at the time of her injury were admissible.

3. EVIDENCE. *Opinions. Manner of injury. Electricity.*

Evidence of a witness as to how and in what way a passenger on the car on which plaintiff was riding when injured might receive a severe shock, should not be excluded.

APPEAL from the circuit court of Hinds county.

HON. W. A. HENRY, Judge.

Suit by Anna Lee Hill against the Jackson Light & Traction Company. From a judgment for defendant, plaintiff appeals.

Appellant was a passenger on an electric car owned and operated by the appellee on the streets of the city of Jackson, and brings this action seeking to recover damages for injuries alleged to have been sustained by her through the negligence of the appellee in permitting its wiring to become defective, and in the negligent and careless operation of its cars. Plaintiff's evidence shows that she was a passenger at an early hour in the morning, and while riding in a seat of the car with a companion that the current breaker just above the motor-man's head dropped with a loud report, and there was an electric flash from beneath the car, accompanied by smoke, and the appellant was thrown from her seat into the aisle and rendered unconscious. She suffered pain for several days in her arm and body, and was quite nervous from the shock, and was confined to her bed and attended by a physician. She claims that she received an electric shock which caused her to be precipitated from her seat. The defense is that she was badly frightened by the flash of electricity and fainted.

After all the evidence was in the court gave a peremptory instruction for the defendant, and an appeal is prosecuted.

Butler, Easterling & Potter, for appellant.

When the appellant rested she had made a *prima-facie* case under two separate and distinct theories. (1) Under the doctrine of *res ipsa loquitur*.

It was shown in this case by the strongest sort of testimony that an injury was inflicted on a passenger by escaping electricity. This is presumptive proof of negligence in the carrier. *Eichhof v. O. N. Shore Street Railway Co.*, 77 Ill. App. 196; *Davis v. Paducah R. & L. Co.*, 113 Ky. 267, 68 S. W. 140.

The existence of a highly electrified metal plate in the passage way for passengers raises a presumption of negligence against the carrier. *McRay v. Metropolitan Street Railway Co.*, 125 Mo. App. 560, 102 S. W. 1032. Negligence on the part of a carrier is inferable if a comptroller box is so charged with electricity as to endanger the safety of passengers who might touch it. *South Covington S. R. Co. v. Smith*, 27 Ky. L. R. 811-86 S. W. 970. The fact being established that injuries to a passenger were caused by electricity, and that the car was so charged with it as to injure a person by contact with any part of it, this makes a *prima-facie* case. *Denver v. Tramway Co. v. Reid*, 4 Col. App. 53, 35 Pac. 269. Proof of injury of a passenger from an electric shock received upon taking hold of the hand bar of a car as he was boarding it raises the presumption of negligence against the carrier. *Dallas Consolidated Electric St. Railway Co. v. Broadhurst*, 28 Tex. Civ. App. 630, 68 S. W. 315.

An electric shock given to a passenger who was only holding on to a brass rail on the rear platform of a car of such force as to throw him off the car, raises a presumption of negligence against the carrier. *D'Arcy v. West Chester R. Co.*, 82 App. Div. 263, 81 N. Y. Sup. 952; *McInnis v. N. O. R. & L. Co.*, 118 La. 811, 43 So. 450, 13 L. R. A. 601 (N. S.); *Poulsen v. Massau Electric Co.*, 18 App. Div. 221, 45 N. Y. Sup. 941; *Chicago Union Traction Co. v. Newmiller*, 116 Ill. App. 625. Affirmed in 215 Ill.

383, 74 N. E. 410; *German v. Brooklyn Heights Railroad Co.*, 107 App. Div. 354, 95 N. Y. Sup. 112.

(2) Under our *prima-facie* statute relating to injuries by the running of cars, and of course, the case was one for the jury.

In order for appellee to overcome this *prima-facie* case, it was necessary for it to show how the accident happened, and that it was guilty of no negligence. We assume the trial court believed that appellee had met this *prima-facie* case.

It is our contention that appellee wholly failed to explain the cause of the accident, and that its evidence shows that it was guilty of the grossest negligence. We further contend that even under appellee's theory of this case to the effect that appellant became frightened at the electrical display and discharge of smoke, that it is liable.

In passing on this case the court must keep in mind the fact that appellee was a passenger on appellee's car, and that it was under obligation to use the highest degree of care to protect its passengers from accident and injury, and also bound to the highest degree of care to confine its deadly current to its wires and thus prevent its escape to the danger of life and property. *Telephone Company v. Cosnahan*, 62 So. 824, 105 Miss.—; *Temple v. Electric Light Co.*, 89 Miss.—.

Looking at the case first from the theory that a *prima-facie* case was made by proof of the injury under the doctrine of *res ipsa loquitur*, we desire to call the court's attention to the very able opinion in the case of *Louisiana etc. Railway Company v. Groome*, 97 Miss. 201. Under the doctrine announced in that case it devolved upon the defendant to meet the *prima-facie* case by evidence showing the use of that degree of care and caution for the protection of passengers required of a common carrier, and also that degree of care and caution required of an electrical company using the dangerous agency of electricity in its business. In other words, it was incumbent

upon the appellee to show that it had exercised the highest degree of care and caution in preventing the accident.

In respect to the presumption created by the statute, we desire to call the court's attention to the very able and exhaustive opinion in *Alabama etc. Railway Company v. Thornhill*, 63 So. 674.

Under both theories it was incumbent upon appellee in order to rebut the *prima-facie* case, to disclose the doing or omission of every act from the doing or mission of which an inference of negligence *vel non* could be drawn.

Under these circumstances it cannot be said with any degree of certainty that appellee was guilty of no negligence, and was not liable as a matter of law. It certainly raised an issue of fact for the jury. "So many questions are integrated usually into the solution of the question of negligence . . . it is so necessary to examine all the circumstances making up the situation in each case, that it must be a rare case of negligence that the court will take from the jury *Belle v. Railroad Co.*, 87 Miss. 234; *Stevens v. Railroad Co.*, 81 Miss. 195; *Allan v. Railroad Co.*, 88 Miss. 25; *Leake v. Railroad Co.*, 91 Miss. 398; *Austin v. Street Railway Co.*, 95 Miss. 867; *Brannon v. Railroad Co.*, 57 So. 172; *Easley v. Railroad Co.*, 96 Miss. 396.

Let it be kept constantly in mind that it was incumbent upon the street car company to show how this accident happened. We assert with entire confidence that it is impossible to tell by reading this record how the accident happened, and the whole matter is left open for speculation and conjecture. So long as this is true, appellee has not met the burden imposed upon it by law, and the case remains one for the determination of the jury. *Alabama, etc. Railway Co. v. Thornhill*, 63 So. 674.

It was fatal error to exclude the testimony of Thompson, Ricketts, Hallam and Metzler with reference to having received shocks on car No. 204 and other cars of the

street car company a short time prior to the accident in question.

This court has had the identical question before it in *Railway etc. v. Miles*, 88 Miss. 208. The court there said that such testimony was admissible. "To show that this (the accident) did not arise from an unavoidable accident not to be foreseen or provided against, but that it was because of the long continued negligence over the whole of the road, which was the subject of complaint to the Company." See also *Railroad Company v. Insurance Co.*, 82 Miss. 777; *Railway Company v. Barnett*, 78 Miss. 435.

We seriously insist that this testimony was competent.

It was also error in the court to exclude the testimony of Metzler as to the inspection and condition of the car and how it was possible for one to receive a shock on it. The whole theory of the defense was that this young lady did not receive a shock, and it was impossible for her to receive a shock in the manner claimed, and that the car was in good condition, and as we have already stated, there was no attempt on her part to show exactly how the accident happened, or of what the negligence consisted. It was not incumbent upon her to do this as a part of main case. But after the company had introduced its testimony tending to show that it had been guilty of no negligence, it was then incumbent upon Miss Hill to show that the company was guilty of negligence, and that this car was negligently and defectively constructed, and explain how it was possible for the accident to have been received. In fact, this is the first time we have ever heard it said that in answer to the defendant's claim of non-negligence under the *prima-facie* statute that the plaintiff was not permitted to show that the defendant was guilty of negligence, and what constituted that negligence, and to show further that the injury did happen, and could have happened because of that negligence, notwithstanding defendant's claim to the contrary.

Wells, May & Sanders, for appellee.

If, in a given case where an injury has happened and where, by reason of the duty that is owed and the circumstances existing, a presumption of negligence arises from the mere fact of an injury having been sustained, it be shown that the duty which was owed to the party receiving the injury, had been performed to the full measure which the law exacts, then there is no breach of duty and there being no breach of duty, there is, and there can be no negligence. This conclusion must be legally and logically applicable to a case like the one before the court, if it be conceded that a carrier is not an insurer of the absolute safety of a passenger. *Washington C. & A. Co. v. Case*, 80 Md. 45; *Gault v. Humes*, 20 Md. 297; 1 Am. & Eng. Law (2 Ed.), 272-273 and note; *Crutchfield v. Richmond & D. R. R. Co.*, 76 N. C. 320; *Wabash etc. R. R. Co. v. Locke*, 112 Ind. 404; *Spellman v. Lincoln Rapid Transit Co.*, 20 L. R. A. 316; *Simmons v. New Bedford*, 93 Am. Dec. 99.

The burden of proof was upon the plaintiff in an action to recover damages from an alleged personal injury sustained, to prove the material allegations of his declaration and the negligence of the carrier, and in the absence of any presumption of negligence on the part of the defendant, the plaintiff must prove by a fair preponderance of the evidence, the facts which show that the negligence of the defendant was the proximate cause of the injury sued for.

No presumption of law as to the negligence of the defendant can arise under the statute or otherwise, until it has first been shown by the preponderance of the evidence, that the injury complained of was proximately caused by some negligent act of the defendant, or by the running of its cars. The plaintiff must prove something which warrants the legitimate inference of negligence on the defendant's part, and not leave his case to rest upon the facts which are just as consistent with care and pru-

dence, as with the opposite, and it is only when the plaintiff has introduced evidence sufficient as a matter of law, to charge the defendant with negligence or has shown facts sufficient to create a presumption of negligence, that the necessity arises for the defendant to introduce testimony in rebuttal of plaintiff's case.

To make out her cause of action it was necessary for the plaintiff to establish, not only that the defendant was guilty of a negligent act, but that the injury complained of was produced by a cause which might naturally and reasonably be expected to follow from a negligent act. Negligence is the proximate cause of an injury, within the legal meaning of that term, when an injury is one which is the natural and probable result of the negligence and one that ought naturally to have been foreseen. Where the only injury which a person sustains is a severe fright, an action will not lie for damage on account thereof, and especially is this the case unless the testimony shows that the fright was occasioned by reason of the negligence of the defendant, and was on account of such negligence. *Lehman v. Brooklyn City R. R. Co.*, 47 Hun. 355; *Ewing v. Pittsburgh etc. R. R. Co.*, 14 L. R. A. 666; *Wyman v. Leavitt*, 36 Am. Rep. 303; *Warren v. Boston etc. R. R. Co.*, 163 Mass. 484; *Mitchell v. Rochester Ry. Co.*, 34 L. R. A. 781; *Haile v. N. P. R. R. Co.*, 23 L. R. A. 774; *Joch v. Danknadt*, 85 Ill. 331; *Western Union Tel. Co. v. Wood*, 21 L. R. A. 706.

The presumption of negligence arising from the proof of the injury is not a presumption of fact but a presumption of law, and hence its weight and effect and the amount and character of proof necessary to overcome it, are questions for the court. *N. River etc. Co. v. Milwaukee R. R. Co.*, 65 N. W. 176; *Central of Ga. v. Waxelbaum*, 35 S. E. 645; *Baltimore v. Nugent*, 39 L. W. A. 161; *Woodward v. S. M. & B. Co.*, 7 C. C. A. 591.

While it may be true that when an accident occurs from a failure of one of the appliances of a car, a *prima-facie* presumption of negligence arises which it is incumbent on

the defendant to meet by the evidence, still, when it appears from the evidence produced, that the measure of care which the law exacts from a carrier had been in fact exercised in respect to such appliances and that the defect, if any, which caused such failure, was latent and not discoverable, and that all reasonable precautions had been made use of, then the principle is well established that the carrier is no liable. *Fearn v. West Jersey Ferry Co.* 143 Pa. 122; *Pershings v. Chicago B. & O. Co.*, 71 Ia. 565; *Norfolk & Western v. Marchall*, 90 Va. 836; Booth on St. Rys., Par. 332; *Fleming v. Pittsburgh etc.*, 158 Pa. 1. 130; *Mexican Central Ry. Co. v. Lauricella*, 87 Texas 279; *Snyder v. Wheeling Elec. Co.*, 64 Am. St. Rep. 922.

Counsel for appellant seem to rely very strongly upon the first and second assignments of error. We will now take up in order and discuss them.

Assignment number one is in the following language: "The court erred in sustaining the objection of the defendant to the offered testimony of witnesses Galloway, Thompson, Ricketts, Hardy, Hallam and Metzler, with reference to having received electric shocks on car 204 and other cars of defendant company, which were constructed in similar manner to the one upon which defendant was riding at the time she received her injury; also in excluding all other testimony to the same effect, offered by appellant, over appellant's objection."

The defendant objected to the testimony of these witnesses on the ground that it was not in rebuttal, and that what may have happened, incident to the car in question, during other times, and under different conditions and circumstances, was not relevant to the issue in this cause.

Applying the rule laid down by Mr. Wigmore to the testimony of these witnesses, it can readily be seen that the court correctly sustained the objection to the testimony along this line, for the reason that it was not shown that the shocks were received under similar con-

ditions and circumstances. This testimony was not in rebuttal of any brought out by the defendant, but on the other hand, injected new matter into the case and attempted to bring other and different issues before the jury, which would have had a tendency to confuse and mislead the jury. *Phillips v. Willow*, 34 N. W. 731.

The second assignment of error is in the following words: "The court erred in sustaining the objection of the appellee to the testimony of the witness, Metzler, an expert, as to the condition of the car at the time of the trial, and as to whether or not it was possible for a passenger on the car to be shocked by electricity, and how and in what way the same might have occurred."

On pages 155 and 157 is found the testimony of the witness Metzler introduced by plaintiff in rebuttal. Plaintiff did not attempt to show by this witness the condition of car 204 at the time of the accident, but they attempted to show by him the condition of the car at the time of the trial of this case, which was on September 23, 1913. (Page 5 and 157 of record.) This testimony was clearly not in rebuttal of any testimony offered by the defendant, as the defendant's testimony tended to show the condition of the car at the time of the accident, on January 22, 1913. Surely the circumstances and conditions were not the same or might not have been the same in September, 1913, or in the fall of 1913, shortly before the State Fair. This phase of Metzler's testimony was correctly excluded, for the reason above advanced. The exclusion or admission of this testimony as pointed out by Mr. Wigmore on Evidence, Vol. 1, par. 444, was a matter of discretion with the trial court, and by way of further answer to the first and second assignments of error, we submit that the trial court in excluding this testimony, but exercised the discretion allowed by law. No harm was done the plaintiff, and this court should not reverse the case because the court exercised sound discretion in this instance.

SMITH, C. J., delivered the opinion of the court.

On the evidence it was for the jury to say whether or not appellant received an electric shock. If she did receive such a shock, that fact, under chapter 215 of the Laws of 1912, is *prima-facie* evidence of the want of reasonable skill and care on the part of appellee with reference thereto, casting upon it the burden of disclosing the doing or omission by it of every act from the doing or omission of which an inference of negligence *vel non* can be drawn. *R. R. Company v. Thornbill*, 63 So. 674.

It appears from appellee's evidence that the electric current was supplied to the motor of the car by four wires, all entering the motor at the same place; that the movement of these wires at their point of contact with the motor, caused by the running of the car, will cause them to gradually wear in two and break; that on the occasion in question, three of these wires had worn in two and the remaining one, being insufficient to carry the current, burnt in two at the motor, causing a short circuit by reason of which the wires by which the electric current was conducted to the motor became sufficiently heavily charged with electricity to cause the circuit breaker to open, thereby shutting the current off. It does not appear from the evidence how the electric current was conducted to appellant; but if it was in fact so conducted, the jury would have been warranted by the evidence in finding that one of the causes thereof was the burning in two of the wire by which the current was then being conducted to the motor. It does not appear how long the three wires had been broken. All that does appear from the evidence in this connection is that they "just kept breaking until . . . there was just one wire left." Any defect in these wires could have been easily discovered by an inspection and remedied. It does not appear that they had been inspected at the time of appellant's injury for two or three months; and it cannot be said, as matter of law, that no inference or negli-

gence can be drawn from this failure to inspect; from which it follows that the peremptory instruction for this reason if no other should not have been given.

I am instructed by my associates to say that the evidence of other shocks received by other passengers on other occasions while riding in the car in which appellant was a passenger at the time of her injury, and also the evidence of the witness Metzler as to "how and in what way a passenger on car 204 [the car here in question] might receive a severe electric shock," should not have been excluded.

Reversed and remanded.

STEVENS, J. (concurring). I concur in the result, but do not think the *primi-facie* evidence statute has any direct bearing on the question as to whether the court below erred in granting the peremptory instruction. There certainly must be "proof of injury inflicted by the running of the engines, locomotives, or cars" of the railroad before the statute raises any presumption. The very issue presented by the peremptory instruction is whether the plaintiff had made "proof of injury" at the hands of appellee—in other words, whether a current of electricity ever in fact reached and shocked her. On the evidence of appellant and her witnesses and not on the statutory presumption, it was for the jury to say whether there was in the first place sufficient proof of injury inflicted by appellee. The very thing upon which the statute hangs the presumption is the thing here in dispute.

WELLS v. STATE.

[70 South. 452.]

HOMICIDE. Evidence. Identification.

Where the only question in a prosecution for homicide, was the identification of the murderer, it was reversible error to admit evidence that deceased a short time before his death but not as a dying declaration, identified defendant as the person who inflicted the fatal wound.

APPEAL from the circuit court of Warren county.

HON. E. L. BRIEN, Judge.

John Wells was convicted of murder and appeals.

The facts are fully stated in the opinion of the court:

- *T. Dabney Marshall*, for appellant.

This conviction ought not to be allowed to stand, even if there were no errors committed by the trial court except in the admission of the statement made by the wounded man.

The statement of John Cassiono, as testified to by Joe Lauderdale, a policeman, was clearly hearsay. It was not a dying declaration, and the presence of the appellant, when the statement was made did not change its character. It was in no sense a part of *res gestae*. It was made long after the alleged shooting, and the circumstances surrounding its making not only rendered it unreliable, and valueless, but it was under such suggestion and outside influence that no human being ought to be deprived of his life or liberty upon it. An attempt was made to justify the admission of this evidence, because the wounded man was confronted by the appellant. This did not change the rule against the admission of hearsay evidence because the evidence shows "that the appellant instantly replied no I never shot you." Without the testimony of the wounded man, which was given under

the suggestion that "we are going to bring the negro who shot you," and also while the wounded man was practically irresponsible as was shown on a motion for a new trial, there would be nothing in this case upon which a verdict could be based, except the testimony of Mr. W. R. Turnage, a street car conductor.

As to dying declarations, it is too elementary to require any citations, that they are inadmissible except when the declarant is under the solemn sense of impending and immediate dissolution to render his declaration admissible, the declarant must not only believe that he is about to die, but must be without hope or expectation of recovery. Am. Eng. Ency. page 366 citing *Bell v. State*, 77 Miss. 507; *Brown v. State*, 32 Miss. 433; *McDaniel v. State*, 8 Smed. & M. 416, there is not a syllable in the record that shows that the wounded man ever considered himself in danger of death, and the admission of his statement was not only wholly improper, but necessarily had great weight with the jury.

Brunini & Hirsch, for the state.

Council for appellant misconceived the theory, under which the evidence of the identification of appellant, by the deceased, was offered. It was not offered, as a dying declaration. It was simply offered, as evidence of what transpired, when the deceased and appellant were brought together. The facts of what transpired were simply related. The occurrences that took place were in the presence of the appellant and the deceased. The testimony was not offered, as a dying declaration of the decedent.

Cook, J., delivered the opinion of the court.

Appellant was convicted of the crime of murder, and sentenced to confinement in the penitentiary for the term of his natural life.

Among other assignments of error is the action of the trial court overruling appellant's objections to the admission of certain evidence whereby it was shown that the deceased a short while before his death, identified appellant as the person who inflicted the fatal wound. There can be no claim that the statement of deceased was, in any sense, a dying declaration, but it is said here that deceased accused appellant of the crime, and that appellant did not deny the charge. The record shows that appellant denied the statement of deceased, that he was the person who shot deceased, and this denial immediately followed the charge.

The sole question before the jury was the identity of the murderer, and the admission of this evidence was highly prejudicial.

Reversed and remanded.

PENN MUT. LIFE INS. CO. v. HENRY, INS. COM'R.

[70 South. 452.]

TAXATION. *Insurance companies. Taxes on receipts. Cash dividends. Paid under policy contracts.*

In a suit by the insurance commissioner of the state against an insurance company for taxes on the annual premium receipts received by the company during stated periods, under Code 1906, section 2629, as amended by Laws 1912, chapter 227, providing that all life insurance companies or associations shall pay annually a tax of two and one-fourth per cent. upon the gross amount of premium receipts, less death claims, matured endowments, and cash dividends paid under policy contracts during the year; where a policyholder's dividend or share in the surplus earnings of a mutual insurance company were not, in fact, paid to the policyholder, but at their re-

quest were deducted from premiums due the policyholder, the policyholder simply paying the difference between the amount of the dividend and the amount of the premium, the money so distributed among the policyholders was "cash dividends paid under policy contracts," since what was done was equivalent to a payment of the dividend to the policyholder in cash, and its immediate return to the company in part payment of the premium due.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Suit by T. M. Henry, Insurance Commissioner against the Penn Mutual Life Insurance Company. From a judgment for plaintiff, defendant appeals.

This suit was begun by the insurance commissioner of the state of Mississippi against the appellant for taxes on the annual premium receipts received from the appellant company during stated periods for 1912, 1913 and 1914; it being alleged that the appellant had deducted in the settlement with the state from the gross annual premiums the dividends applied during each of the stated periods in the reduction of premiums, and that under the law appellant was liable for the tax on the gross premium receipts, and was not entitled to deduct dividends so applied in reduction of premiums.

Section 2629 of the Code of 1906, as amended by chapter 227, Laws 1912, contains the following provision:

"All life insurance companies or associations shall pay annually a tax of two and one-fourth per centum upon the gross amount of premium receipts in this state, less death claims, matured endowments and cash dividends paid under policy contracts in this state during the year."

Agreement of counsel as to the facts and issues is as follows:

It is agreed:

(1) That Hon. T. M. Henry is the duly elected and qualified insurance commissioner of the state of Mississippi, and that he has made lawful demand of the defendant for the amounts herein sued for, which demand

the defendant has refused, upon the ground that it is unauthorized by law, but, should the court hold that said demands are in accordance with law, then the amount of such demands would have been paid, and no penalty or forfeiture, other than lawful interest, shall be imposed.

(2) The Penn Mutual Life Insurance Company is a mutual life insurance corporation under the laws of the state of Pennsylvania; it has no capital stock; distributes no amounts directly or indirectly to stockholders, and all accretions from whatsoever source arising are for the benefit of policy holders in whom the entire management and control are vested; that said company is purely a mutual company, acting in all things for the common welfare of all of its policy holders, who, for practical purposes, constitute the company itself.

(3) That each policy holder is chargeable with all expense incident to his particular policy and all taxes imposed thereon by the governmental subdivisions, and that the amount of these taxes, if collected by the state, would be paid by the policy holders of the state of Mississippi.

(4) This corporation operates on the level premium plan. In mutual life insurance there have been three methods employed of securing from members contributions to meet losses:

(a) The pure assessment plan, under which the loss payable on the death of the member is, after the event, contributed *pro rata* by the surviving members. This plan takes no account of the differing ages of the insured members and the inequality in the probable number of contributions each will have to make, nor of the possibility that diminishing numbers will increase the assessments upon the surviving members. It has been found inequitable and is obsolete.

(b) The natural premium plan, under which each member pays each year the cost of carrying his insurance for that year. As the hazard of death increases annually the premium increases correspondingly, and the

plan is objectionable on this account. This plan is used only by fraternal insurance societies.

(c) The level premium plan is the one in general use by all insurance companies, including this company. Under this plan the maximum annual contribution which any member can be called upon to pay is uniform throughout the life of the policy. The member pays during his early years a sum in excess of the current cost of his insurance. This excess is applied to the creation of a reserve or self insurance fund, which serves to maintain the insurance in the later years, when the stipulated level premium would be insufficient to meet the cost of insurance on the natural premium plan.

Whether the mutual company be conducted on the assessment plan, the natural premium plan or the level premium plan, the member receives his insurance at cost. The assessment company collects its premiums after the death has actually occurred, and the cost is thereby ascertained. The mutual level premium company calculates its estimated premium in advance, and adjusts the actual costs afterwards.

(5) The calculation of premium rates for life insurance involves: First, the adoption of a table of mortality showing the proportionate death rate for each age of life; second, the adoption of an assumed rate of interest such as the company may safely expect to realize upon its invested assets during the lifetime of the policy. These two factors determine what is technically known as the net or mathematical premiums which are the sums sufficient necessary to pay all outstanding policies as they become claims, provided deaths occur exactly in accordance with the table of mortality and the rate of interest earned on the investments of such premiums is exactly equal to the rate assumed. To the net or mathematical premiums there is added a sum technically known as "loading," for the purpose of meeting the expense of conducting the business, as well as any unforeseen contingencies, such as an abnormal death rate due to war or pestilence. The net

or mathematical premiums, increased by the "loading," constitute the premium rates stipulated in the policies of insurance.

(6) Premium rates so computed are, in the experience of life insurance companies, generally found to be in excess of their requirement. In a mutual company such excess constitutes its margin of safety, and must be liberal. Such a company has no capital stock, and must rely entirely upon its premiums to meet unusual contingencies. They must be sufficiently large to insure the company's ability to pay its claims as they accrue beyond peradventure. Their policies may run for a period of fifty or even seventy-five years, and the stipulated premium cannot be increased after the policy is issued. In computing their rates the companies use, therefore, a table of mortality showing an admitted higher death rate than that which will probably be realized. The assumed rate of interest on investments is also lower than that which the Company expects to realize. The provision for expenses and contingencies is greater than would ordinarily be required. Mutual companies have these three margins of safety, and normally each assumption is in excess of what is actually required. They result in excess or redundant premiums.

(7) According to the practice of this company, at the end of each year the excess of income over disbursements is ascertained, and, after setting aside so much of said excess as is required for the increase in policy reserves and other liabilities, the balance is treated as a resource enabling the company thereafter to demand from the policy holder less than his stipulated premium. Each policy holder's share in this so-called fund is then ascertained, and before his next premium falls due he is advised of the amount thereof, and that the company, if he wishes to use it in abatement of premium, will accept in full settlement of such premium the difference between the premium written in his policy and the amount standing to his credit with the company which arisen out of

previous premium payments. Unless used in abatement of premiums, the policy holder may, if he desires, withdraw his share of the so-called fund in cash, permit it to accumulate, or this share is paid to him if he discontinues his policy, or is paid in addition to the amount insured if the policy becomes a death claim. For the first year of each policy this company invariably collects the maximum premium stipulated in the policy, and such premiums form part of this company's taxable income for their respective years. The method of calculating premiums and ascertaining and disposing of the excess described in this and the two preceding paragraphs is practiced not only by this company, but by other mutual life insurance companies generally.

(8) This company permits the policy holder to pay the full stipulated premium, instead of the difference between the stipulated premium and the amount standing to his credit in the abatement fund. In such cases the difference between the amount so paid and the sum required to continue the policy in force is used by this company, either in the purchase of additional insurance, or to shorten the endowment or premium paying period, as the insured elects.

Under the terms of this company's outstanding policies the following sums were, at the election of the policy holders, applied in reduction of renewal premiums during the designated periods:

| | |
|---|--------------|
| Six months ending December 31, 1912 | \$ 17,228.53 |
| Six months ending June 30, 1913 | 17,066.44 |
| Six months ending December 31, 1913 | 22,354.53 |
| Six months ending June 30, 1914 | 20,822.34 |
| Six months ending December 31, 1914 | 22,740.75 |
| Total | \$100,212.59 |

(9) This company by its policy contracts has for many years confined its policy holder's right to participate in the company's annual distributions of the surplus, also for convenience called "dividends." Its form of policy adopted in 1914 provides: "This policy shall participate

annually in the surplus earnings of the company in accordance with the regulations adopted by the board of trustees." Its form of policy adopted in 1908 provides: "This policy shall participate annually in surplus earnings in accordance with its provisions." Also: "VI. Dividends of Surplus—This policy shall participate in surplus and the company will annually determine and account for the portion of the divisible surplus accruing thereto. The owner of this policy shall have the right in any year to have the current dividend arising from such participation applied to reduce the premium, to increase the amount insured, or to accumulate to its credit at three per cent. compound interest per annum, which accumulation will be payable at the maturity of the policy or may be withdrawn at any premium anniversary. If no other option is selected, dividends may be withdrawn in cash." The first of the above provisions quoted from the 1908 policy has appeared in the policies issued by this company from 1908 down to the present time. In order to comply with the statutes of various states requiring a standard form of policies the second provision above quoted was modified, and it now appears in the company's policies in the following form: "VI. Dividends of surplus.—This policy shall participate in surplus and upon payment of second year's premium and at the end of the second year and at the end of each subsequent policy year, while the policy is in force by the payment of premiums, the company will determine and account for the portion of the divisible surplus accruing thereto. These dividends, at the option of the insured, will be applied in any year to reduce the premium, to increase the amount of insurance, or to accumulate to the credit of the policy at three per cent. compound interest per annum, which accumulation will be payable at the maturity of the policy or may be withdrawn at any premium anniversary. If no other option is selected, dividends shall be paid in cash." By action of the board of trustees of this company:

from time to time the above provisions have been made applicable to all outstanding policies of the company.

(10) This company's explanations to the public of its premium rates and distributions of surplus are illustrated by the following extracts from a leaflet issued by the company some years ago:

"A life insurance premium is based upon three assumptions, the sufficiency and accuracy of which have been confirmed by prolonged experience. It has been thought wise to err on the side of safety, and in the consideration of a premium to be very sure that the mortality will be no higher and the interest earned to be no lower than that which is assumed. So also an ample margin is provided for expenses. The result is that every reliable company collects from its members at entry more than the actual experience of the ensuing years requires. Hence 'surplus' premium abatements are made to adjust the charge for insurance at its actual cost at the close of the year.

"There are three sources of this surplus:

"(a) The gain from mortality where it does not equal the expected.

"(b) The gain from interest where earnings have exceeded the assumed.

"(c) The gain from expenses where these have been less than the provision therefor.

"Gains or profits on or from investments are occasionally considered as a fourth source. In general, such gains are regarded as a part of the interest account. It will be readily seen that considerable gains may thus arise when it is known that the average mortality of well-managed companies has rarely exceeded eighty per cent. of the expected losses, and that interest which is assumed to be but three per cent. has through long period averaged considerably more than four and one-half per cent., and that expenses have never absorbed the load for that purpose.

"This surplus may be used in a variety of ways, depending somewhat on the plan of insurance, but usually they are applied:

"(a) To reduce the amount of the annual premium; or

"(b) To increase the amount of insurance; or

"(c) To be accumulated on interest for subsequent use; or

"(d) To accelerate maturity."

The premium receipt issued by this company to its policy holders since 1893 is as follows:

The Penn Mutual Life Insurance Company.
921, 923 & 925 Chestnut Street, Philadelphia.

| | |
|-----------------------------|---|
| Annual Premium...\$ | Received as per margin. premium on policy No. insuring the life of continuing said policy in force, subject to its terms, for one year from the day of This receipt to be valid must be coun- tersigned by Agent. |
| Interest on Note...\$ | |
| Total\$ | |
| Surplus of 191\$ | |
| Cash Required.....\$ | |
| Premium as above re- | This receipt to be valid must be coun- tersigned by Agent. |
| ceived this day of 191 . | |

Agent.

John Humphreys,
Sec'y & Treas.

The company only receives and receipts for the net amount of premium due by the policy holder after the deduction of the sum allowed in abatement of premium.

Green & Green and Henry, Pepper, Bodine & Pepper,
for appellant.

Dividends are not embraced within the verbiage of "gross premium receipts" because: (a) Under the statute adopting judicially defined words whereby the prior law was amended as well as under the decided cases, such an interpretation is impossible; (b) in a mutual company insurance is furnished at cost. There is a severance of the insurance contribution from the margin of safety *id certum est quod reddi certum potest*; (c) the leading case, of *Mutual Benefit Life Insurance Company v. Herold*, 198 Fed. 201 (201 Fed. 918), (231 U. S. 753), determines that life insurance dividends are not income; (d). a premium receipt is an amount paid for insurance and the taxing power does not authorize the transformation of a dividend into that which it is not and thereafter a taxation of it in virtue of its being that which it never became; (e) this suit is based on a misconception, the declaration of a dividend, the cancellation of the annual uncalled margin of safety and not the distribution, in any shape, of any property under any guise, or in any manner, such dividends being merely the elimination of discarded margins in order to correctly keep the books.

If held to be so embraced, then they are "Cash dividends paid" under policy contracts and deducted by reason thereof.

The tax imposed is made, not upon the policy-holders, but upon the insurance company, and it is to be taxed upon its premium receipts and the policy holder is not in any way mentioned; and the first point that we desire to make is that, where, at the date of the passage of a statute its terms have been made the subject of judicial determination by other states, the adoption of the verbiage used in those other states is an adoption of the judicial decisions so construing the same words when used by our law makers.

In *Sampson v. Breed*, Walker (Miss.), 267, this court held that the construction of a local statute adopted from a foreign state would bring with it the judicial determinations there made and would operate as a legislative enactment of such decisions. *College v. Atchison*, 41 Miss. 188; *Marqueeze v. Caldwell*, 48 Miss. 23; *Shotwell v. Covington*, 69 Miss. 735; *Weathersby v. Roots*, 72 Miss. 355; *White v. R. R. Co.*, 55 So. 593.

If a receipt and return exempted a company from taxation upon business done, much more would it be exempted where there has not been a receipt and in the nature of things could not be a receipt because of the inherent obligation of the contract. New York, in *People v. Miller*, 177 N. Y. 518; *German etc. Co. v. Vancleave*, 191 Ill. 414.

"The question whether unearned premiums actually refunded upon cancelled policies constitute any part of the gross receipts of the insurance company was before the supreme court of Illinois in *German Alliance Insurance Company v. Vancleave*, 191 Ill. 410, and it was held that such returned premiums were not to be counted as gross receipts. Under our statute the insured has the right, at any time during the life of the policy, to surrender it to the company, and demand the return of the unearned premium. It is apparent, therefore, that all policies issued are upon the condition that they may be cancelled at any time on demand of the person insured," *State v. Fleming*, 70 Nebraska,—; *State v. Illinois Central Railroad*, 246 Ill. 278; *Fire Ins. Co. v. Lowe*, 108 S. W. (Texas, 1910), 810, S. C. 158.

We submit that the relative rights of the insurance company and the policy holders in the stipulated amount mentioned in the policy are several, separate and distinct. This amount never becomes a fixed obligation and does not represent a debt due. *Worthington v. Ins. Co.*, 41 Conn. 416; *Goodwin v. Ins. Co.*, 73 N. Y. 487; *Ellerbee v. Barney*, 23 L. R. A. 438; *Gibson v. McGrew*, 48 L. R. A.

367; 2d May Ins. 712. 2 Minor's Institutes (4 Ed.) 39; *Ins. Company v. Schlenker*, 80 Miss. 681.

Consider the words of the statute, "Gross amount of premium receipts." When does an amount become a premium receipt? Surely not until it is received by the company as a premium—but the premium—the annual insurance contribution is only to be the actual cost of insurance. As to all amounts in excess thereof, the other policy holders are absolutely without right and the insurance company, their representative, is equally without rights; but under our statute, the thing that is required to be returned is "The amount of gross receipts derived from the insurance business." This makes the proposition too plain for argument and it well might be that this court should hold that no tax whatever was to be apportioned because, as said in *Farmers etc. Co. v. Cole*, 90 Miss. 508. "When the statute speaks of the right to transact the business of insurance in this state, it means the right to do a general business, and has no reference to the restricted right that a mutual insurance company has to insure the property of its own membership." Now, if that was not doing an insurance business, we submit that there was not, in the present case, any gross receipts derived from an insurance business.

The leading case now upon the subject is *Mutual Benefit Life Insurance Company v. Herold*, 198 Fed. 201. *Simmons v. State*, 70 Miss. 476.

Another point to be noted is that the basis of this suit arises from a misconception engendered from the misnomer, "Dividends." It is true that some insurance companies are glad that this term was invented as it offers an inducement to the unthinking by which they conceive they are making large earnings, but when applied to participating life insurance its meaning is so radically different that one cannot use the term without becoming more or less confused. *N. Y. Life Ins. Co. v. Statham*, 93 U. S. 36; *Worthington v. Charter Oak Life Insurance Co.*, 41 Conn. 416; Cook on Life Insurance, page 148.

There is no proper relation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the life assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance. The payment of a premium in either case operates merely to continue the old contract. *Abel v. Penn Mutual*, 18 W. Va. 426.

All statutes *in pari materia*, must be construed together, *Scott v. Searles*, 5 S. & M. 25. All statutes upon the same subject are to be so construed as to produce a harmonious interpretation, if such is practical. Again in *Bank v. Archer*, 8 S. & M. 151, the court said: "The several statutes are to be considered together and carefully compared as having one object in view and being part of the same system and when so construed, to be made harmonious." *Swan v. Buck*, 40 Miss. 268; *Clements v. Anderson*, 46 Miss. 581.

The statute in question is imposing a burden, inconsistent with the common law and interferes with the exercise of a right which has been protected sedulously in this state, and being so thus in derogation of common right, the construction must be strict. So, in *Hopkins v. Sandidge*, 31 Miss. 668, it was held that the revenue act of 1850, prescribing a forfeiture for the non-payment of taxes, being in derogation of the common law, was to be strictly construed and its operation confined within the limits of the language employed. *Dibrell v. Dandridge*, 51 Miss. 55; *McInnis v. State*, 52 So. 634.

But the statute in question is to be construed strictly for another reason, viz.: it imposes an onerous duty by way of privilege taxation, as said in *Ex Parte Taylor*, 58 Miss. 482. "The rule is well settled that laws imposing duties or taxes are not to be construed beyond the

natural import of the language and are never to be construed as imposing burdens upon citizens upon doubtful interpretation. Potter's Dwarrior on Statutes, 90."

Again, *Bell v. Kerr*, 80 Miss. 179, holds, "This statute is penal and must have strict construction." Still later in *Railway v. Clark*, 95 Miss. 691, the court said: "Laws imposing privilege taxes are to be liberally construed in favor of the citizen and courts will not extend the statute which taxes beyond the clear meaning of the language employed." *Vicksburg v. State*, 62 Miss. 105; *Wilby v. State*, 93 Miss. 767.

So that, if the court should hold, which we respectfully submit is not the case, that dividends are premium receipts, then we insist that the dividends, if received, are to be deducted because they are amounts received in cash under the policy contracts. *Dreyfus v. Barton*, 54 So. 254; *Boston etc. v. Wellington*, 113 Mass. 86; *Lea v. Cutrer*, 51 So. 808; *Bishop v. Bishop*, 81 Conn. 527; *Smith v. Dana*, 77 Conn. 543, 548, 556, 557, 60 Atl. 117; *Boardman v. Mansfield*, 79 Conn. 633, 637, 66 Atl. 169; *Green v. Bissell*, 79 Conn. 547, 552, 65 Atl. 1056; *Green v. Bissell*, 89 Conn. 551; *Leland v. Hayden*, 102 Mass. 542; *Alleghaney v. Pittsburg, etc. R. Co.*, 179 Pa. St. 414, 36 Atl. 161; *Olsen v. Homestead L. & I. Co.*, 52 Barb. (N. Y.) 45, 2 Cook on Corporations (5 Ed.), sec. 534; *Doland v. Williams*, 101 Mass. 571; *Myers v. Estelle*, 47 Miss. 4; *Cummings v. Bank*, 101 U. S. 153; Broome's Legal Maxims (7 Ed.), 685; *Adams v. Ry Co.*, 75 Miss. 283; *Martin v. Osborne*, 34 Miss. 21; *McIntyre v. Ingraham*, 36 Miss. 25; Broome's Legal Maxims (7 Ed.), 539; *Kentucky, etc. Co. v. Commonwealth*, 156 S. W. 897; *People v. State*, 31 Mich. 8; *Owens v. Denton*, 5 Tyrw, 360; *Pratt v. Foote*, 5 Seld. 463, 6 Id. 599; Domats Civ. Law, pt. 1, b. 4, tit. 2, Cuch. Ed.; *People v. American Central Ins. Co.*, 146 N. W. 235.

Wherefore, we respectfully submit that this statute must be construed, first not to include within its terms

dividends thus paid; and, second, if included, then that they are excluded under the exception mentioned.

Geo. H. Ethridge, Assistant Attorney-General, for appellee.

It seems to me that the whole controversy in this case turns upon the meaning of the term, "Gross premiums" used in the statute and the definitions of "gross income," "gross premiums" and "gross earnings" and set forth at length in Volume 2 of the supplement to Words & Phrases, pages 785 to 796, and I think it is perfectly clear that the statute intended to tax the entire amount of premiums received less premiums which were actually returned during the policy year where a policy was taken up or cancelled and a portion of the premium then returned.

I submit that the agreed statement of facts in this case discloses that the full premiums named in the policy may be paid each year, either in cash or by other property which belongs to the policy-holder and that applying the earnings of the company which belong to the policyholder is not a change or an abatement of the premium in any manner whatever. It will be noted especially under paragraph 6 of the policy set out in the agreed statement of facts that this earning or accumulation, which of course belongs to the corporation until it has been set aside for the policyholders by formal action and calculation on the part of the directors or managers of the company, was held subject to the determination of the company and they were to be accountable therefor, and under the said paragraph 6, the insured has the option to apply it in three different ways, one of which is to receive the actual money and this option is the one that is applied by the corporation in case the insured did not direct otherwise.

It follows, of course, if the insured should take the money and use it for other purposes than reduction of premium that he would be required to pay the full amount of the premium named in the policy. No doubt

many policy holders apply their *pro rata* of the earnings of the company either to increasing the amount of insurance or withdrawing the cash money and pay the premiums as they become due. It was absolutely unsound, therefore, to contend that the premium is automatically reduced by this amount of earnings because such plainly is not the case, but instead of being automatically reduced, the money is remitted to the policyholder where the policyholder does not make one of the other applications allowed him in the option. When the fund is applied in the reduction of premiums, it again becomes the property of the corporation and the individual has no claim or right on that money and no control over it.

The appellant has filed an elaborate brief in which numbers of authorities are quoted from extensively and some of them are set out in full. I do not deem it necessary to go into any elaborate analysis of these cases. I think that they are all unsound which hold that the company is entitled to deduct from its taxes the amounts used by policyholders in reduction of premiums. The best reasoned case that I have found on the subject is *Fire Association of Philadelphia v. Love*, reported in 108 Southwestern, page 158, which says:

"1. Taxation. Insurance. "Gross amount of premiums," "Gross."

The words, 'gross amount of premiums' received, as used in the statute, providing for the levy and collection of an occupation tax on corporations, etc., and requiring every fire insurance company to annually report 'the gross amount of premiums received' in the state on property located there and from persons residing there, during the preceding year, and imposing an annual tax on the gross premium receipts, and declaring that the gross premium receipts are the premium receipts reported to the commissioner on the sworn statement, etc., include sums which a fire insurance company paid for reinsurance without proof that the companies in which it reinsured had the right to claim a portion of the pre-
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mium at the time the insurance was effected, and include the sums returned to policyholders on the cancellation of policies as provided therein; the word 'gross' meaning whole, entire, total, without deduction.

2. Statutes. Construction.

Where the language of a statute is plain and unambiguous, there is no room for construction and it is not admissible to resort to forced constructions to limit or extend the meaning or language, and, where words have acquired a definite meaning in law, they must be so expounded.

The claim for a reduction of the sum returned to the policyholders upon cancellation is more plausible, but not more sound in true legal construction of the act, than the other. It is true that the policyholder had the right under the contract to surrender his policy and claim the unearned premiums, and there was a right on the part of the insurance company to do likewise, but there is nothing which indicates with any certainty that the demand would be made by either. It is simply a matter of choice, and the funds that went into the hands of the insurance company became its property subject to its absolute control and disposition.

The word 'gross' is defined: 'whole, entire, total, without reduction.' Websters dictionary. *Scott v. Hartley*, 126 Ind. 246, 25 N. E. 826. The language under consideration, in the statute is 'the gross amount of premiums received in the state.' There is no ambiguity in the language of the statute, and there can be no doubt at to what its ordinary meaning is. The rule governing the interpretation of such language is thus stated in *Chambers v. Hill*, 26 Tex. 472, 'Where language is plain and unambiguous there is no room for construction.' *State v. G. H. & S. A. Ry. Co.* 97 S. W. 71, 16 Tex. Ct. Rep. 918.

I respectfully submit that the learned circuit judge was correct in his ruling and that his judgment should be affirmed.

SMITH, C. J., delivered the opinion of the court.

Two questions are presented to us by the record in this cause:

First, did appellant actually collect money as premiums on its policies in excess of the amount reported by it as the gross amount of premiums received and on which it has paid taxes? and in event this question should be answered in the affirmative:

Second, is the money distributed by appellant to its policyholders under clause VI of its policies "cash dividends paid under policy contracts?"

It is unnecessary for us to answer the first of these questions; for an affirmative answer to the second will dispose of the cause, and it seems to us that it must necessarily be so answered. That these dividends were not, in fact, paid to the policyholders, but, at their request, were deducted from the premiums due, each policyholder simply paying the difference between the amount of his premium and the dividend due him, does not alter the situation; for dealing with the dividend in this manner is the equivalent of each policyholder receiving his dividend in cash and immediately returning it to appellant in part payment of the premium due on his policy.

Reversed and cause dismissed.

ISLER v. ISLER ET AL.

[70 South. 455.]

1. JUDGMENT. *Conformity to pleading. Deeds. Effect. Construction. Contracts. Intent. Signature and delivery. Presumption.*

Where, in a suit by a divorced wife against her former husband and another, she alleged in her bill, that during the time of their married life she and her husband acquired title to the land in controversy, the deed being made jointly in their

names. That subsequently she joined her husband in a deed of the land to another. That she was induced to sign said deed, because she understood that it was necessary for her to do so in order that said deed should pass the interest of her said husband. But when she testified as a witness, complainant said that she was induced to sign the deed by the written agreement of her husband that she would receive one-half of the purchase price of the land. In such case the allegations of the bill did not correspond with the proof and she could not recover.

2. *DEEDS. Effect. Construction.*

The question whether a person who signs a deed, but is not named in it as grantor is bound by it, should be one of construction, to be determined by reference to the circumstances connected with the transaction, rather than by a fixed and arbitrary rule of law.

3. *CONTRACTS. Construction. Intent.*

If it appears by a contract that a party intends to bind himself, trivial inaccuracies will be disregarded and if the intention of the parties can be ascertained, courts will effectuate that intention.

4. *DEEDS. Construction. Signature and delivery. Presumption.*

By signing and delivering a deed, a party should be held presumptively to have assented to its provisions, or at all events, his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning.

APPEAL from the chancery court of Tallahatchie county.

HON. M. E. DENTON, Chancellor.

Bill by Mrs. Ida D. Isler against A. V. Isler and another. From a decree for defendants dismissing the bill, complainant appeals.

Appellant was complainant in the court below, and appellees, A. V. Isler and H. L. Fox, were defendants. Complainant filed her bill in the chancery court of Tallahatchie county, Miss., in which she alleged that she was a resident of the city of Memphis, Tenn., that defendant Fox was a resident of Tallahatchie county, and that defendant Isler's residence was unknown. She alleged that

she and A. V. Isler had once been husband and wife, and that during the time of their married life she and her husband acquired title to a certain tract of land in Tallahatchie county, the deed being made jointly in their names. Subsequently it is shown that this land was sold to H. L. Fox for a consideration, payable in annual installments. The conveyance recited that A. V. Isler was the grantor. Ida D. Isler signed the instrument of conveyance with A. V. Isler, her husband, but A. V. Isler only acknowledged it; Mrs. Isler having failed to acknowledge it. She alleged in her bill that:

"She was induced to sign said deed, because she understood that it was necessary for her to do so in order that said deed should pass the interest of her said husband to H. L. Fox."

She claims that her husband's interest only passed, and that she still has an undivided one-half interest in the property, and that her interest in the property did not pass to Fox, and if it did pass, then she claims an undivided one-half interest in the purchase money and for an accounting from A. V. Isler for any part of the purchase money which he may have collected. She further averred that she had been advised that Fox had reconveyed the property to A. V. Isler in settlement of the notes. A. V. Isler answered, admitting that Fox had reconveyed the land to him, and denying that Mrs. Isler had ever had any interest in the property, and that she signed the deed of her own free will and accord, and that there was no understanding that she was to share in the purchase money. He admitted that the property was held in their joint names, but alleged that it had been purchased with his own money and was in fact his property. After hearing the proof, the chancellor dismissed the bill, and complainant appeals.

Dinkins & Caldwell, for appellant.

The case of *Catlin v. Ware*, 9 Mass. 218, 6 A. D. 56, is one of the early, and is usually referred to as one of the

leading cases on the subject. In that case the question was presented as to whether or not a deed of the husband's land, signed by both husband and wife, the wife not being mentioned in the deed as a grantor, barred her right or dower in the land. Quoting from the statement of facts, i. e.:

"Upon the trial the deed was produced but the demandant's appeared only after the signature of her husband, and nowhere in the deed were there any words purporting or implying a release of her dower."

Quoting next from the opinion:

"A deed cannot bind a party sealing it, unless it contains words expressive of an intention to be bound. In this case whatever may be conceived of the intention of the demandant in signing and sealing the deed, there are no words implying her intention to release her claim of dower in the lands conveyed, which must have been to give it that operation. It was merely the deed of the husband, and the wife is not barred by it of her right to dower."

We will not undertake to cite the thousands of cases holding as in *Catlin v. Ware*, but the line of decisions is unanimous and practically unbroken down to the present time. We will content ourselves with referring to a few special decisions that should be sufficient to satisfy the court fully as to the correctness of our contention. *Fite v. Kenemer*, 7 So. 920; *Bank v. Rice*, 4 How. U. S. 225, 11 L. Ed. 249; *Harrison v. Simons*, 55 Ala. 510; *Madden v. Floyd*, 69 Ala. 221; *Bly v. Dargin*, 68 Ala. 370; *Davidson v. Cox*, 20 So. 500; *Johnson v. Goff*, 22 So. 995; "Where there are no grantors there is no remedy even in equity." 10 Ohio R. 305. To the same effect see *Batchelor v. Brereton*, 28 Law Ed. (U. S.) 748.

The text in 13 Cyc. 540 says: "A deed signed and acknowledged by persons not named therein as grantors is not their deed, and if it is signed and sealed by two, only one of whom is described in the instrument as the grantor, it is the deed of that one only. A deed

signed by a part of those named in it is good as to those signing it."

In *Cornando v. Wright*, 159 Cal. 610, 115 Pac. 227, Ann. Cas. 1912 C., 1044, which was an action to recover damages for trespass alleged to have been committed on plaintiff's land and which involved the question of the effect of a deed executed by John and Catherine McDonald, husband and wife, to the county of Sonoma, purporting to convey land to be used as a public highway, the deed was signed and acknowledged by both the husband and wife, and others, but the wife's name, who was the owner of a one-half undivided interest therein, was not mentioned in the granting clause.

The court, in the above case, reviews at some length the authorities upon the question involved, holding that the deed did not effect the interest of the wife, Catherine McDonald, who, though she signed and acknowledged it, was not mentioned in the granting clause, and citing: 13 Cyc. 621; *Agricultural Bank v. Rice*, *supra*; *Batchelor v. Brereton*, *supra*; *Adams v. Medsker*, 25 W. Va. 127; *Harrison v. Simons*, 55 Ala. 510; *Gaston v. Weir*, 84 Ala. 193; *Johnson v. Goff*, 116 Ala. 648; *Peabody v. Hewett*, 52 Me. 33; *Cox v. Wells*, 7 Blackf. (Indiana) 410; *Catlin v. Ware*, 9 Mass. 218; *Lufkin v. Curtis*, 13 Mass. 233; *Merrill v. Neilson*, 18 Minn. 366; *Stone v. Sledge*, 87 Texas 49; *McFarland v. Febigers*, 7 Ohio (Pt.1) 194; *Banks-ton v. Crabtree Col. Min. Co.*, 95 Ky. 455.

The supreme court of Mississippi has not left us in doubt about this question but has clearly and distinctly held in the cases of *Marx v. Jordan*, 84 Miss. 334 and *Mills-Guy Co. v. Dickerson*, 94 Miss. 874, and in the recent case of *Manasco v. State*, 62 So. 427, that a conveyance signed by a person whose name does not appear in the granting clause is the conveyance alone of those who are described therein as grantors.

In the case of *Dinkins v. Latham*, 45 So. 60, (Ala.) the court expressly approves those decisions, holding that the mere signature of one to a deed who is not named

in the granting clause is not the deed of such person, but holds that it is the right and duty of the court to scrutinize the instrument carefully and that if anything can be found therein indicating a purpose on the part of such signer to be bound, and, as in that case, finding that the notes, though signed alone by Mrs. Dinkins, the proper grantor, contained an endorsement upon them in writing, by the husband, that he had consented to her signature thereto. This, with the use of the word "our" in the testimonium clause and the signature of both the wife and husband thereto was held sufficient to express the husband's assent as required in the statute aforesaid. But, commenting on the other cases, Tyson, C. J. uses this language: "It would be a violation of the natural interpretation of language to interpolate another name into the enumeration merely because the name is signed at the foot of the instrument."

We will not quote further from the language of the court in that case. The reasoning is clear and satisfactory that the express consent of the husband to the signature of the notes of the wife and his signature to the instrument under the words, "Witness our hands and seal," and his acknowledgment that he signed and sealed the instrument clearly indicated an intention on his part to join therein and be bound thereby.

The only case brought to our attention in which it has been directly held that the signing and delivery of a deed by one not named therein as the grantor binds such person, is that of *Sterling v. Parks*, (Georgia), 58 S. E. 828, also reported in 13 L. R. A. (N. S.), 298 and 12 A. & E. Ann. Cas. 201, but in the extensive and voluminous notes in the two volumes last mentioned, it is clearly and distinctly declared that the decision is against the weight of authority.

R. L. Cannon, for appellee.

The evidence fully warranted the finding of the following fact by the chancellor: The complainant, Mrs. Ida

D. Isler, appellant here, voluntarily signed and delivered the deed to H. L. Fox, intending thereby to convey to said Fox, her interest in said land. Indeed, this proposition is beyond controversy, being established by the testimony of both appellant and appellee.

The evidence fully warranted the finding of this further fact by the chancellor. Said purchase money notes executed by said H. L. Fox in payment for said land and the deed of trust securing them were given to appellee, A. V. Isler, with the free consent of appellant, and with the intention on her part that said appellee should be the sole and unconditional owner of said notes.

Notes and mortgages given to the husband with the free consent of the wife in payment for lands purchased from the wife become his property. 21 Cyc. 1300.

One who signs and delivers a deed, though not named therein as a grantor, is still bound as a grantor, and the deed is operative as a conveyance of his estate. *Armstrong v. Stovall*, 26 Miss. 275; *Sterling v. Park* (Ga.), 12 Ann. Cas. 201; *Elliott v. Sleeper*, 2 N. H. 525; *Ingoldsby v. Juan*, 12 Cal. 564; *Hrouska v. Janke*, 66 Wis. 252, 28 N. W. 166; 3 Washburn on Real Property, 2120; 1 Devlin on Deeds, sec. 204 & note; *Hargis v. Ditmore*, 86 Ky. 653, 7 S. W. 141; *Peter v. Byrne*, 175 Mo. 233, 75 S. W. 433, 97 Am. St. Rep. 576; *Johnson v. Montgomery*, 51 Ill. 185; *Dentzel v. Waldie*, 30 Cal. 138; *Pease v. Bridge*, 49 Conn. 58; *Evans v. Summerlin*, 19 Fla. 858; *Woodward v. Seaver*, 38 N. H. 29; *Clark v. Clark*, 16 Or. 224, 18 Pac. 1; *Ochoa v. Miller*, 59 Tex. 460; *Morgan v. Snodgrass*, 49 W. Va. 387, 38 S. E. 695; *Friedenwald v. Mullan*, 10 Heisk (Tenn.) 226.

The signing and delivery of a deed by one who is not designated in the body thereof as the grantor, will estop such person to deny the execution of such deed.

The signing, delivery and acknowledgment by a husband of a deed conveying his wife's separate property will estop him from setting up any claim to the property against the grantee, although he is not designated as

grantor in the body of the deed. *Stone v. Montgomery*, 35 Miss. 107.

A wife by signing a deed executed by her husband conveying his property, wherein she is not designated as grantor, is estopped to dispute the grantor's title to the property. *Gates v. Card*, 93 Tenn. 334, 24 S. W. 486.

Where one signs and delivers a deed, but is not designated as a grantor in its body, the instrument, though it may be inoperative as a legal conveyance, constitutes a valid contract to convey, and the grantee receives the equitable title to the premises. *Rushton v. Davis* (Ala.), 28 So. 476.

Appellee is not precluded from relying in this case on the estoppel of appellant to deny the execution of the deed to H. L. Fox, signed by her. Where it is necessary to plead estoppel (as estoppel of record), defendant need not plead such matter of estoppel where the failure to plead it is waived by plaintiff by proceeding with the trial of the case without objection. 16 Cyc. 809.

Where it is necessary to plead estoppel (as estoppel of record), if the allegations amount to an estoppel, it is sufficient, although the estoppel is not pleaded in so many words. 16 Cyc. 810.

Estoppel *in pais* need not be pleaded. 16 Cyc. 806; *Turnipseed v. Hudson*, 50 Miss. 435.

The judgment appealed from is presumed to be right until, by affirmative showing on the record, the contrary is established. 3 Cyc. 275; *Scharff v. Chaffee*, 68 Miss. 641, 9 So. 897; *Smith v. Berry*, 1 S. & M. 321.

"It is well settled that the decree of the court below must be regarded as presumptively correct, and that we will not be warranted in reversing on the facts, unless convinced that it is opposed to the preponderance of the evidence." *Jones v. Bank*, 71 Miss. 1023, 16 So. 344; *Allen v. Smith*, 72 Miss. 689, 18 So. 579.

On appeal the judgment will be presumed to have been fully supported by express findings which are not in the record. That sufficient findings to support the judg-

ment were made will be implied if the record does not show that they were not or could not, upon the issue and the evidence, have been made; and in order to sustain the judgment, additional findings to those shown in the record, which may be supported by the evidence upon the issues, may be presumed to have been made. 3 Cyc. 311.

Cook, J., delivered the opinion of the court.

The bill of complaint sets out that the complainant, appellant here, signed the deed because she was advised that it was necessary to do so in order that her husband, the real grantor, should effectually convey his interest in the land to the grantee. When complainant testified as a witness in her own behalf, she said that she was induced to sign the deed by the written agreement of her husband that she would receive one-half of the purchase price of the land. In other words, she testified that she owned a one-half interest in the land, and her husband owned the other half interest, and that the legal title to an undivided one-half interest was vested in her because she had furnished a part of the money to buy the land. So, it appears that she has alleged one thing and proven a different thing. The *allegata* and the *probata* do not correspond. If she signed the deed for the reasons given in her testimony, she certainly intended to convey her interest in the land in consideration of the agreement that one-half of the proceeds of the purchase-money notes, executed by the grantee, would be paid to her. The deed in question is, in form, practically a statutory deed. It is true that the name of appellant does not appear in the premises of the deed, and the name of her husband does, but it is also true that neither the name of herself nor her husband appears in the granting clause of the deed, but they both signed the instrument. Appellant did not acknowledge the deed; why she did not do so does not appear. If she is to be believed, it was her intention to convey her interest in the land for the reasons above stated. The testimony of appellant

does not vary or contradict the terms of the deed itself. The meaning of the instrument is somewhat doubtful, but the testimony of appellant removes all obscurity, and she will not be heard to complain that the chancellor took her word for the facts on that score. She makes clear her reason for signing the deed, and thereby destroyed her chance for recovery.

We quote with approval the following from Devlin on Deeds, Vol. 1, sec. 204, especially the last sentence, as applicable to this controversy, viz.:

"The question whether a person who signs a deed, but is not named in it as grantor is bound by it should, in the author's judgment, be one of construction, to be determined by reference to the circumstances connected with the transaction, rather than by a fixed and arbitrary rule of law. In several of the cases that have been cited in the preceding sections, the decision of the court was based upon the ground that a wife could not relinquish her right of dower, unless the conveyance contained apt words expressive of such an intent, and that by merely signing a deed in which she was not mentioned, her claim of dower remained unaffected. Possibly, a distinction can be drawn between such cases and cases where the party signing was under no disability. The general rule for construing all contracts is that if it appears by a contract that a party intends to bind himself, trivial inaccuracies will be disregarded, and if the intention of the parties can be ascertained, courts will effectuate that intention. Now, if a party signs a deed, he must do it for some purpose. It is in practice the general custom for deeds to be drawn by others than the parties to them. The scrivener may have omitted the name of the grantor, or by mistake may have inserted a wrong name. If such should be the case, and a party should sign a deed, intending to bind himself, all parties supposing he had executed an effectual conveyance, is it reasonable to say that the deed is nugatory because the party signing was not named in the conveyance? The fact that

he signs and delivers the deed should be entitled to greater consideration, in determining whether he intended to convey his title, than the writing of his name in the deed by some one else. It has been objected to this view that the relations between the parties are to be determined from the language of the deed, and if that shows an intended contract between a party who does not execute the instrument, the party who does sign cannot be bound, because he is, so far as the deed itself evinces the intention of the parties, a person with whom no contract was intended to be made. But assuming that such an instrument shows that the contract was originally intended to be made between certain persons, and that is all that can be claimed, such an intention may subsequently have been altered. If the name of the party originally mentioned in the deed should be erased and the name of the party signing substituted, there can be little question that the party whose name was substituted and who executed the instrument, would be firmly bound by the instrument. If he signs the instrument, though his name is not substituted or mentioned at all in the deed, should not some effect be given to his act? We think so. While it may well be that in such a case he should not be conclusively bound, yet we think that by his signature and delivery of the deed, he should be held presumptively to have assented to its provisions, or, at all events, that his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning."

The evidence for appellee is to the effect that appellant signed the deed for the purpose of conveying her legal title in the land to the grantee, and that she understood that appellee would receive all of the purchase money. The chancellor evidently believed that the facts were as stated by appellee.

Affirmed.

BELL v. STATE.

[70 South. 456.]

EMBEZZLEMENT. Proof of conversion. Necessity.

Where defendant was charged with embezzlement, in that he collected as agent from another a premium on an insurance policy and converted the same to his own use. Where there was no evidence showing or tending to show that the money was, by the defendant, converted to his own use, he should be acquitted.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

W. D. Bell was convicted of embezzlement, and appeals.

Appellant was indicted and convicted of embezzlement, the indictment charging that he collected from one Jenkins a premium on an insurance policy and converted the same to his own use. Jenkins never received his policy of insurance, and had appellant indicted. It is not shown by the evidence that appellant retained the money or used it in any way for his own benefit.

Hardy & Arnold, for appellant.

There is absolutely no testimony to support the finding of the jury. To concede for the moment that the appellant was the bailee of Jenkins there is absolutely no testimony to show that he unlawfully used the money, but all of the testimony shows that he used it as he should. Call him agent, bailee, cashier or what not, the state must show that he embezzled the money before there can be a legal conviction. Mr. Jenkins knew the money must be sent on before he got his policy, and the testimony shows that this is exactly the use that he made of it. But in no sense under our statutes can this appellant be classed as a "Bailee." There was no obligation to return the specific things that were intrusted to him but there was an obligation to forward the money for another

thing which was done. See Words & Phrases, Vol. 1, page 672, under heading "Bailee" and cases there cited.

Then unless it appears from the clear letter of the statute that this appellant was a "Bailee" he cannot be included by implication. The statute must be strictly construed in his favor. See *West v. State*, 70 Miss. 598; *Wortham v. State*, 59 Miss. 179; *Johnson v. State*, 63 Miss. 228; *Stafford v. State*, 44 So. 801; *Foote v. Vanzant*, 34 Miss. 40. And all the holdings of our court on this point are to the same effect.

Ross A. Collins, Attorney-General, for the state.

The appellant contends that no crime of embezzlement has been made out since he was acting as the agent of the insurance company and not of Jenkins in the transaction, but I submit that the facts show that the agent solicited the money for the premium from Jenkins and promised to deliver to him the policy in question and was therefore the bailee or agent for the said Jenkins and his conduct clearly comes within the terms of our statute defining embezzlement. Section 1136 of the Code of 1906.

The appellant's further contention is, that he is not got guilty of embezzling twenty-five dollars or over if guilty of anything, and therefore his sentence to the penitentiary is excessive. He attempts to show that the proceeds of the twenty-seven dollar check given to him by Jenkins did not, owing to the way he handled it, net him but twenty-one dollars and seventy-five cents. He says that he took this twenty-seven dollar check and gave it to Jenkins' son and received therefor twenty-one dollars and seventy-five cents in cash and another check for five dollars and twenty-five cents which he claims he never realized upon. It is clear, from the reading of the record, that the appellant's failure to receive the face value of the twenty-seven dollar check was due to no fault of Jenkins but was due entirely to the circuitous

route which he chose to collect it. In fact, the record finally leaves us in doubt as to whether the check for five dollars and twenty-five cents has been actually collected or not as the appellant only says that up until a few days ago it had not been collected, whereas it has been but a few days since it was placed for collection from an out of town bank.

The appellant also urges as error, instruction Number 1 for the state in that it charges the jury that "if you believe from the evidence in this case beyond a reasonable doubt, that the defendant, W. D. Bell, received as agent from E. J. Jenkins, the sum of twenty-seven dollars for the purpose of purchasing for the said Jenkins a sick and accident insurance policy and that the said defendant never delivered the said policy or the said twenty-seven dollars to the said E. J. Jenkins, but feloniously did embezzle and secrete and convert the same to his own use as charged in the indictment, then it is the sworn duty of the jury to convict the defendant as charged in the indictment."

I submit that the language of section 1136, of the code in defining embezzlement covers this instruction inasmuch as it is not material whether the appellant was acting as the agent of Jenkins or the company if, in fact, he embezzled the funds he secured.

The next error is aimed at the second instruction for the state which tells the jury that if they believe from the evidence beyond a reasonable doubt that the check for twenty-seven dollars was paid and that the appellant received it for the purpose of securing the policy and embezzled same, they may find the defendant guilty. The appellant says that this instruction is not predicated on the facts in the record, basing his contention on the ground that the check for twenty-seven dollars was not paid. The evidence shows that the check in the hands of Jenkins' son was paid at the bank and it was no fault of Jenkins, the drawer of the check, that the appellant did not receive his money. If a person be allowed to show

that the original funds embezzled do not, in the end after trading and speculation, net him a certain amount, then grounds for an endless inquiry is at hand. He at least accepted the check for five dollars and twenty-five cents and upon failure of the payee thereon paying same, the appellant would have recourse upon the endorser which, in this case, was Jenkins' son. I therefore submit that this contention is without force and that upon the whole the record shows that the jury were amply warranted in returning the verdict they did, which verdict I respectfully submit should not be disturbed by this court.

Cook, J., delivered the opinion of the court.

This case must be reversed, for the reason that the evidence for the state does not make out the charge laid in the indictment. There is no evidence showing or tending to show that the money was, by the defendant, converted to his own use.

Reversed and remanded.

KEYS v. STATE.

[70 South. 457.]

1. INDICTMENT AND INFORMATION. *Amendments. Right of make.*

Where an indictment under Laws 1908, chapter 115, making it an offense to sell intoxicating or spirituous liquors, charged that accused did sell "spirituous and intoxicating" etc., it may be amended by the insertion of the word "liquors" after intoxicating, under Code 1906, section 1426, allowing amendments to cure formal defects; since such a defect was a mere clerical error and could not prejudice accused in his defense.

110 Miss.—28

2. CRIMINAL LAW. *Trial. Instructions.*

The refusal of an instruction for the defense that the jury should "not consider the physical defects of defendant as any evidence against him" was proper, since the jurors are presumed to be men of common sense and needed no instruction of this character.

APPEAL from the circuit court of Covington county.

HON. W. H. HUGHES, Judge.

Andy Keys was convicted of the unlawful selling of intoxicating liquors, and appeals.

The facts are fully stated in the opinion of the court.

G. H. Merrell, for appellant.

The demurrer ought to have been sustained. It is true that sec. 1508, Code 1906, authorized an amendment whenever on the trial there shall appear to be variance between the statement in the indictment and the evidence offered in proof thereof in the name of any person or description of any property or thing, etc., when such an amendment shall not be material to the merits of the case, but this has no application to the case at bar. In this case no variance appeared whatever, because no proof had been offered, which is a condition precedent to the right to amend. If evidence had been offered and there appeared to be a variance, the amendment is material and goes to the very substance of the indictment, and without it the indictment charges no offense.

The word liquors omitted in the indictment is not a description of any property, thing or the name of any person, but is the property itself, and its omission makes the indictment fatally defective. Indictments may be amended in matters of form, but not in matters of substance. See *Cyclopedia of Law and Procedure*, Vol. 22, page 433, paragraph 2. *McGuire v. State*, 35 Miss. 366; *Kline v. State*, 44 Miss. 317; *Blumberg v. State*, 55 Miss. 528; *Cook v. State*, 72 Miss. 517, 17 So. 228, 44 So. 810.

If this amendment is authorized, then the court may read by intendment into an indictment a charge of any one of the several offenses under the Dramshop Laws of Mississippi, wherein the penalty is different. This judgment cannot be pleaded in bar of another prosecution. There are many kinds of liquors or medicinal preparation that are spirituous and intoxicating, which is not a violation of law to sell. The court did not know and could not know, nor did the indictment show on its face what charge the grand jury intended to present against the appellant. The indictment charges no offense known to the law; therefore there was nothing to amend.

If this amendment is authorized, then what has become of the constitutional safeguards that the accused shall be informed of the nature and cause of the accusation against him, and that he shall not be proceeded against criminally by information only in the excepted cases named by the Constitution and statutes. The amendment as it stands is not a presentment or indictment by the grand jury but an indictment by the court on motion of the district attorney. We submit that such an amendment is not authorized by law either in misdemeanor or felony cases, and the demurrer ought to have been sustained.

It was error for the court to refuse to give the instruction asked by the appellant to the effect that the defendant's physical defects were not to be considered as any evidence against him. The fact that appellant is a dwarf in nowise changes the rule of law. The defendant's physical defects were no evidence against him and this instruction should have been given. See *Cyclopedia of Law and Procedure*, Vol. 21, 384-621.

Ross A. Collins, attorney-general, for state.

The first of these alleged errors relates to the order of the court overruling the demurrer to the indictment which had been interposed on the ground that the word,

"liquors" had been inserted by amendment before trial in the circuit court. See indictment page 2 of record.

It seems that the indictment did not contain the word, "liquors" but stated that "did then and there unlawfully sell and retail spirituous and intoxicating against the peace of the state of Mississippi." Appellant urges that this was reversible error inasmuch as it was an amendment in substance and not in form. Let it be remembered that the offense alleged was a misdemeanor and it was competent for the legislature to dispense with the inquest of a grand jury, but since an indictment for the offense was returned, I submit that under the broad terms, of the authority granted, under section 1508, of the Code of 1906, taken into consideration with the general principles governing indictments, the omission of the word "liquors," does not render this indictment void. It is a general principle governing indictments that if what is omitted is implied in that which is expressed, the indictment is good. Joyce on Indictments, page 223. The omission of the word, "liquors," does not leave ground for cavil as to what was intended to be expressed as the meaning is manifest at a glance. I submit that if the indictment had the word "sell" omitted, then there would be some ground for question as to whether it was the intention of the draftsman to insert some other word descriptive of some other offense under the liquor laws, but in the instant case, the omission of the word, "liquors" leaves no ground for doubt as to the design of the draftsman, and as it has been said, "it is the cherished object of the court to render effective the design of the draftsman when that design is manifest." I submit that this word and the meaning of the indictment is too manifest to admit of doubt.

The next error alleged relates to the refusal of the court to grant an instruction charging the jury not to consider the physical defects of the defendant as any evidence against him. (Page 29, of record.) The record

does not contain any evidence upon which this instruction could properly be predicated and was properly refused.

SMITH, J., delivered the opinion of the court.

This is an appeal from a conviction for the unlawful selling of intoxicating liquor. The indictment alleged that appellant "did . . . sell . . . spirituous and intoxicating against the peace and dignity of the state of Mississippi." A demurrer being interposed thereto, the district attorney, by permission of the court, over the objection of appellant, amended the indictment by inserting the word "liquors" between the words "intoxicating" and "against." The demurrer was then overruled. Chapter 115, Laws of 1908, provides that:

"If any person shall sell . . . any . . . intoxicating or spirituous liquors, he shall on conviction be fined," etc.

It is manifest from a mere inspection of the indictment that the offense therein intended to be charged is that defined by this statute, and that the absence of the word "liquors" is a mere clerical omission, so that the defect in the indictment may be treated as a formal one within the meaning of section 1426, Mississippi Code of 1906. *Gamblin v. State*, 45 Miss. 658. That appellant was prejudiced in the preparation of his defense, or was in the least doubt of the crime he was charged with having committed, because of the omission from the indictment of the word "liquors," is inconceivable. Consequently no error was committed in permitting the amendment.

Appellant's requested instruction to the jury "not to consider the physical defects of the defendant as any evidence against him" was properly refused. The jurors, we presume, were common sense men, and needed no instruction of this character.

Affirmed.

WATKINS v. STATE.

[70 South. 457.]

1. CRIMINAL LAW. *Trial. Examination of witnesses. Absence of accused.*

The examination of a witness in the absence of the defendant charged with a capital felony is reversible error.

2. SAME.

If it be conceded that section 1495, Code 1906, providing that in criminal cases the presence of the prisoner may be waived, is applicable to capital felonies, still it does not apply where the defendant did not know that a witness was going to be examined while he was out and his counsel were not aware of his absence from the court room.

APPEAL from the circuit court of Hinds county.

HON. W. H. POTTER, Judge.

Ebb Watkins was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

Powell & Featherstone, for appellant.

From the time when the memory of man runneth not to the contrary it has been the settled law in Mississippi that a prisoner charged with a capital crime who is in custody at the time of the trial must be present at every moment of the trial and in addition the record must so show. This rule was first adopted by this court in 1847, in the case of *Scoggs v. State*, 8 S. & M. 722. *Price v. State*, 36 Miss. 531; *Stubbs v. State*, 49 Miss. 716; *Long v. State*, 52 Miss. 23; *Rolls v. State*, 52 Miss. 392; *Brooks v. State*, 81 Miss. 391; *Sherrod v. State*, 93 Miss. 774; *Warfield v. State*, 96 Miss. 170; *McClendon v. State*, 96 Miss. 250; *Stanley v. State*, 97 Miss. 860; *Sadley v. State*, 98 Miss. 401; *Lee v. State*, 101 Miss. 387; *Doss v. State*, 104 Miss. 598.

I had foolishly imagined perhaps, that with this unbroken line of decisions extending over a period of nearly seventy years of the state's judicial history, that the question at issue had been fully, completely, and finally settled at least in this state, and I tried to impress this view upon the court below in our motion for a new trial. How miserably I failed, the court can gather from the very elaborate opinion or brief which the learned judge below has filed in this case after the case had been finally decided in his court. This has been incorporated in the record for the guidance of this court. Being therefore a little diffident of my powers to enlighten, I humbly submit the matter for further elucidation to the wisdom of this honorable court.

Edward Mayes, for the state.

Cook, J., delivered the opinion of the court.

Appellant was convicted of the crime of murder, and sentenced to a life term in the penitentiary, and appeals to this court. The record shows that a witness for the state was examined in the absence of the accused. It appears that this witness was called to the stand and sworn, whereupon the presiding judge retired temporarily from the courtroom, and then the defendant, at his own request, was taken from the courtroom by the sheriff to answer a call of nature. In the absence of the defendant, the judge took the bench and the state proceeded to examine the witness, and after having finished the examination the witness was tendered to defendant's attorneys, and was partially cross-examined when the defendant's absence was discovered. The court then required the state to re-examine the witness in the presence of defendant, which was done.

By a long and unbroken line of decisions this court has held that the examination of a witness in the absence of the defendant charged with a capital felony is fatal to the trial. *Scaggs v. State*, 8 Smedes & M. 722;

Price v. State, 36 Miss. 531, 72 Am. Dec. 195; *Stubbs v. State*, 49 Miss. 716; *Long v. State*, 52 Miss. 23; *Rolls v. State*, 52 Miss. 392; *Booker v. State*, 81 Miss. 391, 33 So. 221, 95 Am. St. Rep. 474; *Sherrod v. State*, 93 Miss. 774, 47 So. 554, 20 L. R. A. (N. S.), 509; *Warfield v. State*, 96 Miss. 170, 50 So. 561; *McLendon v. State*, 96 Miss. 250, 50 So. 864; *Stanley v. State*, 97 Miss. 860, 53 So. 497; *Sadlen v. State*, 98 Miss. 401, 53 So. 783; *Lee v. State*, 101 Miss. 387, 58 So. 7; *Doss v. State*, 104 Miss. 598, 61 So. 690; It is too late to overrule these decisions and adopt a new rule. If it be true, as argued by the state, that the decisions were based on common-law principles, it would seem that the legislature has approved the rule announced by nonaction in reference thereto.

We do not believe that the facts of this case bring it within the terms of section 1495, Code 1906, if it be conceded that the section is applicable to capital felonies. The record does not disclose that the defendant consented to the examination of the witness in his absence.

On the contrary, the record clearly shows that the defendant did not know that the witness was going to be examined while he was out of the courtroom, and the record further shows that defendant's counsel in active control of his trial were not aware of defendant's absence.

Reversed and remanded.

DANIELS v. STATE.

[70 South. 458.]

VAGRANCY. Sentences. Excessive sentence.

A defendant convicted of vagrancy under Code 1906, section 5058, which provides that a party convicted of vagrancy shall be committed to jail for not less than ten nor more than forty days and shall not be liberated from such sentence by payment

for the time to be served, unless such person gives bond with sufficient security for future industry and good conduct for one year from the date of the bond, cannot be required to give bond to keep the peace for two years, and such a provision will render the whole judgment excessive and unlawful.

APPEAL from the circuit court of Jones county.

HON. P. B. JOHNSON, Judge.

Birdie Johnson was convicted of vagrancy and appeals.

The facts are fully stated in the opinion of the court.

D. B. Cooley, for appellant.

The judgment in this case is condemned in the case of *Warwick v. State*, 59 So. 2, and therefore the case must be reversed.

Ross A. Collins, attorney-general, for the state.

The *Warwick Case*, *supra*, is clearly distinguished from the case under consideration inasmuch as the court in the *Warwick Case* entered an order suspending sentence during the good behavior of defendant upon the payment of all costs and at a subsequent term of court, entered a judgment on the suspended sentence for an alleged breach of the conditions thereof. The court held that section 5058 of the Code, did not warrant the suspension of the sentence in such case, but in such cases provides that the court shall commit such person to jail for not less than ten nor more than thirty days and said person so committed shall serve said sentence for the prescribed time, and shall not be liberated from such sentence by payment for the time required to be served by said sentence unless such person give bond with sufficient security to be approved by the clerk in any sum not less than two hundred and one dollars for the future industry and good conduct of such person for one year from the date of the giving of such bond. It is manifest that under the provisions of this statute the

court in the Warwick Case, was without authority to suspend the sentence if, in fact, under the holding of the *Fuller Case*, 57 So. 808, it is under any circumstances permissible to do so. The only analogy that the appellant can draw between the case at bar and the Warwick Case is derived from the recital in the judgment of the court to the effect that, "the sentence having been suspended until a later day of this court, it is now ordered," etc. It is obvious that the sentence was not suspended in the sense of the Warwick case, but the appellant was merely remanded to jail to await the sentence of the court during the same term, which proceeding is customary and proper. The appeal in this case is, therefore, without merit and I respectfully submit that the case should be affirmed.

STEVENS, J., delivered the opinion of the court.

Appellant was convicted on the charge of vagrancy and sentenced to imprisonment "in the county jail for twenty-five days and to execute a bond in the sum of five hundred dollars to keep the peace for two years." The assignment of errors challenges the legality of the judgment imposing this sentence. As announced by this court in the case of *Warwick v. State*, 102 Miss. 143, 59 So. 2, section 5058, Code of 1906, prescribes the only judgment within the power of the court to render. That provision of the judgment requiring appellant to give bond for two years renders the whole judgment excessive and unlawful.

The judgment of the circuit court will be reversed, and the cause remanded, in order that the circuit court may resentence appellant.

Reversed and remanded.

YAZOO & M. V. R. CO. v. SCOTT.

[70 South. 459.]

WATERS AND WATER COURSES. *Flowage. Construction of railroads.*

It is the duty of railroad companies not only to properly construct, but properly to maintain, their roadbeds with sufficient openings to permit the flow of surface water and where a railroad company originally constructed its roadbed with a long trestle under which the surface waters followed their natural flow, but in the course of time gravel and other debris from the tracks washed under the trestle so as to form an obstruction, thus preventing the flow of surface water and inundating the adjacent lands, the company was liable.

APPEAL from the circuit court of Bolivar county.

HON. T. R. SCOTT, Judge.

Suit against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Montgomery & Montgomery, Chas. N. Burch, H. D. Minor and Mayes & Mayes, for appellant.

We submit; First: That this land, according to the testimony of Mr. Burford, for fifteen years was not drained at all, so that no crops could be made on it except in one or two very dry years. Second: That if the drainage is not so good now as it was fifteen years before the suit was brought (and there seems to be very little difference according to the proof) it is because of the gradual accumulations of earth and gravel under the trestle, washed there by the rains, for which the defendant could not be liable. Certainly that is the law of this case under the fifth instruction given for the defendant and which must stand on this appeal because the plaintiff has not appealed and can assign no error. See *Duff v. Snyder*, 54 Miss. 245.

We therefore submit that the plaintiff has no case, that the peremptory instruction for the defendant should have been given, and therefore ask that the case be reversed and dismissed.

This plaintiff knew the land before he rented it. He rented it knowing of this defect in the drainage. He bought a lawsuit; brought it and, on all of the evidence, he is entitled to lose it.

The case of *Canton, etc., R. Co. v. Paine*, 19 So. 199, is not in point here, because in that case the trestle was not properly constructed, while in the case at bar, the trial court specifically held, in the fifth instruction for the defendant, that the road was properly constructed.

In *Ill. Cent. R. Co. v. Miller*, 68 Miss. 763, the liability of the Railroad Company was upheld because the company had dug a ditch and thus precipitated the water on plaintiff's land.

Under all the evidence in this case, and in the light of all the authorities in Mississippi on the subject from the case of *Ill. Cent. R. Co. v. Miller*, 68 Miss. 763, down to the case of *Y. & M. V. R. Co. v. Sultan*, 63 So. 672, the plaintiff is not entitled to recover. These cases include, in addition to the two cited. *Ala., Etc., R. Co. v. Beard*, 93 Miss. 294; *Ill. Cent. R. Co. v. Wilbourn*, 74 Miss. 284; *Sinai v. Louisville, etc., R. Co.*, 71 Miss. 547; *K. C. & M. R. R. Co. v. Smith*, 72 Miss. 677; *Y. & M. V. R. Co. v. Davis*, 73 Miss. 678; *Thompson v. Railroad Co.*, 61 So. 596.

Thos. S. Owen, for appellee.

The first instruction for plaintiff is the law of this state as approved in *Sinai v. L. N. O. & T. R. R. Co.*, 71 Miss. 547; *Thompson v. Railroad*, 61 So. 596; *Railroad v. Sultan*, 63 So. 672. In fact, instruction number 1, will, by comparison, be shown to be very much like instruction one in the Sultan Case, if not *verbatim*.

Instruction number 2 for plaintiff is also very similar to the instruction in the Sultan Case, and is borne out

by the case above cited. Counsel, in commenting on this instruction, says that the opening was the full length of the natural drain. This is true but it is not the full *depth* of the natural drain as it originally was, and it is the duty of the appellant to make it that depth or deeper, if necessary, to permit the flow of water to drain the land.

Appellant also makes the statement that if plaintiff had dug a canal or ditch ten or fifteen feet deep from the western border of the right of way to Knox Bayou, it would not have been the duty of the railroad company to dig under its trestle, a canal or ditch of equal depth. If plaintiff had dug a canal ditch ten or fifteen feet deep along the natural water course on both sides of the right of way across his land, it would have been the duty of the appellant to have put one the same depth under its trestle to permit the flow of the water. In addition to the authorities above cited, see 72 N. E. 219; 50 Lawyers Ed., U. S. Reports, 596, where the right of a riparian landowner and a railroad company in a natural water course are fully discussed.

Instruction number 3. This instruction, on the measure of damages, can be found in the Sultan Case. The *Smith case* in 72 Miss. 677, quoted by counsel, has no bearing on this case. In that case, the crop was destroyed by the overflow of a creek before the water deflected by the embankment ever reached it. If the crop on this land in 1910 and 1911 had been destroyed by an overflow from a break in the levee, certainly we cannot be heard to complain of an injury to it by obstructing surface water, which had not reached the crop until it was covered by overflow water. Other authorities: *R. R. Co. v. Hubbard*, 85 Miss. 480, 485; Suther on Damages (3 Ed.), sec. 1023 and 1049; *R. R. Co. v. Lackey* (Miss.). 16 So. 909; *R. R. Co. v. Davis*, 73 Miss. 678; *R. R. Co. v. Borsky* (Tex.), 21 So. 911 ; Monographist note to *R. R. Co. v. Sayers*, 27 L. R. A. (N. S.) 168.

STEVENS, J., delivered the opinion of the court.

Appellee, as plaintiff in the court below, instituted this action for damages against appellant, averring that by the improper construction and maintenance of appellant's roadbed the crops attempted to be raised by appellee on certain lands in Bolivar county were flooded and destroyed in the years 1910 and 1911. Appellee was lessee for the years 1910, 1911, and 1912 of a certain plantation through which the roadbed of appellant's railroad runs. To the east of the roadbed on the lands leased by appellee and to the north of these lands the natural slope of the land is to the southwest. The water that falls on the watershed east of the railroad flows in a southwesterly course. The railroad company, in the original construction of the roadbed provided a trestle or opening one hundred and twenty-seven feet long through which the water flowed in its natural course from the lands east of the track to the southwest. There was a natural depression at the point where the trestle was provided. Appellee contends, and the proof shows, that since the construction of the roadbed appellant has used in the constant repair and maintenance of the roadbed a great deal of gravel, which has fallen and washed to the ground under the trestle, and this accumulation of gravel, with dirt and other debris, raised the elevation of the ground under the trestle to an amount variously estimated from twelve inches to several feet, and this accumulation obstructed the natural flow of water from appellee's lands from east to west, and as a consequence the water is impounded and caused to overflow one hundred and twenty acres of appellee's lands. Part of the plantation involved lies west of the railroad, and appellee, in an effort to drain his lands, dug a ditch through that portion lying west of the track; but he contends that the water impounded on the east will not drain through the ditch because of its inability to pass over or through the right of way of appellant. It is shown

that the section foreman, in an effort to relieve the situation, dug a small ditch under the trestle, but in so doing struck one of the mud sills which had been placed there in the original construction of the trestle, and which had become gradually covered or buried some fourteen inches under the surface with the accumulation of dirt and gravel. There was evidence that the ditch provided by the section foreman was inadequate, and that even it had become filled up. There is ample evidence that the railroad company, in the upkeep of its roadbed, has piled gravel on the track, and that a good deal of this gravel rolled off and gradually filled the ditches left on either side of the tracks higher than the surface of the natural ground.

The court instructed the jury for appellant that there was no testimony showing improper construction of the roadbed, and that the jury could not assess any damages based upon improper construction. The main contention of appellant is that the court should have given it a peremptory instruction.

On the question of liability of appellant for obstructing the natural flow of surface water, there can be no distinction between improper construction of the roadbed in the outset and the improper maintenance of that same roadbed after construction. The principle, therefore, announced by this court in *Sinai v. Louisville, etc., R. R. Co.*, 71 Miss. 547, 14 So. 87, *Thompson v. Railroad Co.*, 104 Miss. 651, 61 So. 596, and *Y. & M. V. R. R. Co. v. Sultan*, 63 So. 672, 49 L. R. A. (N. S.) 760, applies with equal force to the instant case. In the original construction of the roadbed across these lands appellant found it necessary and proper to leave this long trestle through which the water naturally flowed, but the proof shows that the gravel transported and deposited by appellant along and on its roadbed has materially contributed toward the gradual filling up of the ditches and opening originally left, and that now the surface of the ground immediately under the track has been raised to a point

materially higher than the surface of the ground east or west of the right of way, and it is this elevation, caused by the gradual mixture of gravel, weeds, brush and dirt which impounded the water on the lands leased by appellee, and which, according to the proof, destroyed his planted crops for the years 1910 and 1911. There was sufficient evidence to sustain liability.

We have examined the instructions complained of, and find no reversible error. The contention seems to have been made by appellant all along, and the idea is stressed in some of the refused instructions asked by appellant, that the railroad company is not liable for anything washed on the right of way by the rains, or for the natural increase or elevation. It is the duty of the railroad company, however, not only properly to construct, but properly to maintain, the roadbed with sufficient openings to permit the flow of surface water under circumstances disclosed by the case at bar.

Affirmed.

COLLOTTA ET AL. v. STATE ET AL.

[70 South. 460.]

INTOXICATING LIQUORS. Injunctions. Statute. Beer. "Vinous liquor." Spirituous liquors.

Under Laws 1910, chapter 134, as amended by Laws 1912, chapter 256, authorizing an injunction against persons who may sell or give away any "vinous or spirituous liquors" unlawfully, a person who only sold "beer" cannot be enjoined, though the beer contained alcohol, for beer is a malt liquor, and is neither a "vinous nor spirituous" liquor.

APPEAL from the chancery court of Sunflower county.

HON. E. N. THOMAS, Chancellor.

Bill by the state of Mississippi and others against D. Collotta and others. From a decree for complainants, defendant appeals, and Sunflower County and the Town of Indianola file cross-appeals.

The facts are fully stated in the opinion of the court.

Frank E. Everett, for appellants.

Chapman & Johnson and *L. F. Easterling*, Assistant Attorney-General, for the state.

Cook, J., delivered the opinion of the court.

This action was begun in the chancery court of Sunflower County by the state and by the county of Sunflower jointly. The bill of complaint was drawn under chapter 134, Laws 1910, as amended by chapter 256, Laws 1912, and the complainants sought and obtained an injunction restraining defendants from selling the liquors described in the statutes above mentioned. The bill also sought and obtained an attachment which was levied upon the property of defendants. The defendants in their answer denied that they had ever sold any vinous or spirituous liquors. A motion was made to dissolve the injunction and discharge the attachment. Both motions were overruled, and a final decree was entered perpetuating the injunction.

The case was tried upon an agreed statement of facts, from which we quote the parts pertinent to the issue presented to this court, viz.:

"The bill in this cause was filed under chapter 134 of the Laws of 1910, and the amendment thereto, being chapter 256 of the Laws of 1912. On or about the 1st day of January, 1912, D. Collotta commenced business in a certain building located on part of lot twenty-four in block O in the town of Indianola, Sunflower county, Miss., described in the bill of complaint in this cause,

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paying a privilege tax for a near beer stand, under chapter 97 of the Laws of 1912. The defendant D. Collotta is a son-in-law of Joe Carrero, one of the defendants. The near beer license has always been taken out in the name of D. Collotta and paid for by Joe Carrero with money belonging to Collotta. Continuously from the time of the opening of said business as aforesaid until the writs of attachment and injunction were served in this cause the defendant D. Collotta sold to customers who came to his establishment and called for beer various drinks which had the appearance of beer, and the chemical analysis of which shows the following amount of alcohol by weight and volume in the various drinks sold by D. Collotta, as aforesaid: First, alcohol by volume 3.95 per cent. alcohol by weight, corrected, 3.09 per cent.; second, alcohol by volume, 3.65 per cent., alcohol by weight, corrected, 2.85 per cent.; . . . fourth, alcohol by volume, 3.83 per cent., alcohol by weight, corrected, 2.99 per cent.; . . . tenth, alcohol by volume, 3.61 per cent., alcohol by weight, corrected, 2.81 per cent.; eleventh, alcohol by volume, corrected, 3.55 per cent., alcohol by weight, corrected, 2.77 per cent. All of which was manufactured by Frank Fehe Brewing Company, of Louisville, Ky., and by the Tennessee Brewing Company, of Memphis, Tenn."

The statute relied on to support the decree of the chancery court provides for the procedure followed in this case against persons who may "sell or give away vinous or spirituous liquors unlawfully." If the liquor sold falls within the definition of the statute, the decree will be affirmed, as this court has already pronounced the statute constitutional. *State v. Marshall*, 100 Miss. 635, 56 So. 792, Ann. Cas. 1914A, 434.

It is not claimed, and we believe it cannot be maintained, that the liquor sold by appellant was a "vinous" liquor, and so the state insists that the liquor was a "spirituous" liquor within the meaning of the statute. It is argued that the liquor as one of its elements con-

tained alcohol, and that alcohol is a spirituous liquor, and is also intoxicating, and therefore the legislature must have intended by the use of the word "spirituous" to give the remedy pursued against persons selling intoxicating liquors. It might be possible to construe the word as synonymous with "intoxicating," but for the fact that vinous liquor is also intoxicating, and sometimes contain a much greater percentage of alcohol than the liquor sold in this instance, and for this reason, if for no other, it is obvious that the legislature did not think that spirituous would cover vinous liquors. Why add "vinous" when "spirituous" would have been sufficient? It is to be assumed that the lawmakers knew the definition the courts had placed upon the words employed by it.

This court, in *Smith v. State*, 94 Miss. 259, 49 So. 113, said:

"There can be no . . . doubt that beer, as commonly prepared, is a malt liquor, as distinguished from spirituous and vinous liquors."

It will be seen that it has been judicially declared that malt liquors and spirituous liquors are entirely different. Besides, the legislative history of the state will demonstrate that it has always been deemed necessary to differentiate malt, spirituous, and vinous liquors. The legislature has always classified the liquors differently, and every cub of the law has always known that his client could not be convicted for the sale of malt or vinous liquors under an indictment charging the sale of spirituous liquors. We think the variance in the proof and statute brings this case within the rules applicable to indictments. The appellant here was charged with selling vinous and spirituous liquors, while the proof shows that he did not sell either. The facts in this case seem to indicate that the liquor handled by appellant was a weak beer. It looked like beer, tasted like beer, was sold for beer, and, no doubt, the customer thought he was drinking beer. It was not spirituous liquors either in the ordinary sense or within the judicial definition of

the word, or within the previous legislation on the subject.

It would be futile to conjecture why the legislature elected to confine the remedy prescribed in the statute to cases wherein the liquor sold was spirituous or vinous. The courts cannot assume the power of legislation, nor presume to write into the statutes words to carry out what the court may conjecture the legislature intended to do.

Reversed and remanded on appeal of D. Collotta and affirmed on appeal of county of Sunflower and town of Indianola.

Reversed and remanded.

D. ROSENBAUM SONS v. BLACKWELL.

[70 South. 548.]

ESTOPPEL. *Equitable estoppel. What constitutes.*

When a daughter made a deed to her father and mother to a homestead upon which she and her husband were living at the time but her husband did not join in the deed, such deed was void, and when the father afterwards purchased some mules and to secure the purchase price gave a trust deed on such land, and the same was sold out under such trust deed, the daughter who had done nothing to estop herself could claim the land from the purchaser at such trust sale.

APPEAL from the chancery court of Lauderdale county.

HON. SAM WHITMAN, JR., Chancellor.

Bill by Mrs. Amanda P. Blackwell against D. Rosenbaum Sons. From a decree for complainants, defendants appealed.

Appellants sold Mitcham and wife, the father and mother of appellee, some mules, and as additional secur-

ity for the purchase price took a deed of trust from the Mitchams on forty acres of land owned by appellee, who did not join in the execution of the deed of trust. The debt for the purchase price not being paid, appellants took back the mules and foreclosed the deed of trust on the land in the chancery court, appellee not being made a party to the proceedings.' A commissioner was appointed by the chancery court to make the sale, and appellants purchased the land at the sale. Thereafter appellee filed a bill to cancel appellants' claim of title as a cloud upon her title to the property, and the chancellor granted the relief prayed.

Easterling & Bailey, for appellants.

The operation of the rule of equitable estoppel has been declared in this state under many conditions, a few of which we offer as follows, to wit:

"A female infant, nineteen years of age, knowing her rights, conveyed land to her father, for the purpose of enabling him to borrow money by giving a mortgage thereon to one who was ignorant of her minority. The money was loaned, and subsequently, the lender being still ignorant of her minority, the father conveyed the land to pay the debt. The infant, arriving at full age, brought ejectment. Held, that a court of equity would restrain her from asserting her legal title and thus perpetrating a fraud." *Ferguson v. Bobo*, 54 Miss. 121.

In that case, our court even went so far as to prohibit a minor from asserting her title, after causing injury to an innocent dealer therein.

"If a mortgage creditor conceals his incumbrance and wilfully contributes to giving the mortgagor a false credit, though not in fact intending to wrong others, he will be estopped from setting up any advantage under the mortgage as against those who have been induced by appearances to extend the mortgagor credit." *Hilliard v. Cagle*, 46 Miss. 309.

"Though ordinarily a freehold estate in land cannot be transmitted by parol, yet the owner may so act with reference to it that he will be estopped to assert his title. This doctrine applies without reference to the statute of frauds." *Vicksburg, etc., R. Co. v. Ragsdale*, 54 Miss. 200.

"When an adult married woman permits her husband in her presence to mortgage her separate personal property, and remains silent as to her claim, while the mortgagee upon the faith of the uncontradicted statements of the husband that the property is his, takes the mortgage and furnishes them supplies, she is estopped, as against such mortgagee, to claim it." *Levy v. Gray*, 56 Miss. 318; *Richardson v. Toliver*, 71 Miss. 966, 16 So. 213.

"A purchaser of personal property from a mortgagor is not affected with notice of the mortgage, though it be recorded, if he has no actual notice, and the mortgagee, by his acts or declarations induces him to believe that he has no lien on the property." *Evans v. Fortsall*, 58 Miss. 30; See also, *Wynne v. Mason*, 72 Miss. 424, 18 So. 422.

"Registry laws cannot be invoked to shield actual fraud, hence, the holder of a recorded title to land may, by his conduct, inconsistent therewith, be estopped to assert it against one who has been misled by him to his prejudice." *Wynne v. Mason*, 72 Miss. 424, 18 So. 422; See, also, *Evans v. Fortsall*, 58 Miss.

Clothing another with apparent title or authority;

"One who has received a conveyance of land which reserves an express lien for the purchase money, and who believing that the legal title is still in his grantor, procures another to buy the land and has the grantor to make to such other a conveyance, is estopped thereafter to set up his title against the claim of title thus acquired." *Money v. Ricketts*, 62 Miss. 209.

Now as to the proposition that she, appellee, was not estopped because she did not understand her legal rights, we submit that in each and every case which counsel for

appellee may submit in support of such a proposition is where the party or person acts or fails to act because of his ignorance of any right which he has in the property being dealt with, such as this court reviewed in the case of *Thomas v. Romano*, reported in 82 Miss. 256, 33 So. 969, which is a case based upon facts, substantially as follows, as gathered from the syllabus, to wit:

"Defendant and her two minor children, all non-residents, were tenants in common of land which was sold for taxes, a third party buying at the sale, and afterwards obtained a decree confirming his title. Later defendant visited the land, saw the third party's attorneys, and was informed that her one-third interest was lost. Needing money for her children's support, she authorized a real estate agent to sell the land, and a bill was filed for that purpose by her as guardian, the third party's attorneys acting for her. The agent induced complainant to buy at the sale for one thousand dollars, and complainant paid the third party three hundred and three dollars, and paid six hundred and sixty-six dollars in the court for the minors. Defendant was an ignorant woman, the third party's tax title was in fact void, and the decree confirming it was later set aside. Held, that defendant was not estopped to claim her third interest in the land."

Another case wherein our court held that there was no estoppel is the case of the *Scottish-American Mortg. Co., Limited, et al. v. Bunckley et al.*, 88 Miss. 641, 41 So. 502, wherein Mr. Justice Campbell, Special Judge, said, in part, at top of page 503, of second column, as follows, to wit:

"The question is; Is he estopped by his silence? The truth is he did not know that he had any interest in the land. As stated by counsel for the mortgage company, "It was not considered in the family at that time, nor until after 1893, that the children of Nathan had any interest whatever in the property in controversy," etc., citing authorities.

The cases which so hold, are cases wherein the person against whom the estoppel would have operated was absolutely ignorant of his rights or had no rights at the time of the transaction, such as was the case in the above mortgage case, except in that case both conditions were true.

In the instant case, appellee's contention is that she had never sold the land in question and owned it all the time since 1898. She does not show that there was anything of record to show who owned the land, as she admits that for some reason her patent had never been delivered, although it is conceded that she was entitled to one. The court will, I assume, take judicial notice of the fact that final receipts are not placed of record.

Williams & Martin, for appellee.

In the case of *Scottish-American Mortgage Co. v. Albert N. Bunckley et al.*, 88 Miss. 641, the rule applicable to the case at bar, is laid down as follows: "Where one person executed a mortgage on lands, and thereby secured a loan in the presence and to the knowledge of another, the mortgagee cannot predicate an estoppel to claim the land by the mere silence of that other. (a) If he were ignorant of his rights at the time he failed to speak; or (b) If his title were duly of record; or (c) If the mortgage did not rely upon what he said or did or left undone." The presence of any one of these conditions precludes an estoppel by conduct.

Let us apply this rule to the case at bar, bearing in mind that the defendants set up estoppel and the burden of providing each necessary element of estoppel is upon them. In the testimony of W. A. McDonald, a witness for the defendants, on page 66 of the record, under cross-examination, it appears that on one rainy day he was talking to Mr. and Mrs. Mitchem and Mrs. Blackwell at their home, and they told him the land was Mr. Mitchem's, and showed him, witness, the deed. The same

witness on pages 61 and 62 of the record proved that the complainant was an ignorant woman, having no education, except an ability to read and write. And so we submit, the defendants have proven that the complainant was ignorant of her rights of the land at the time the Rosenbaum Deed of trust was executed, and hence, under this rule, she is not estopped by her silence, in now claiming her forty acres. This is the affirmative proof the defendants made as to the complainant's knowledge of her rights in the land at the time of the Rosenbaum Deed of trust. But, if this is not sufficient to prove her lack of knowledge, the defendants in meeting the burden of proving estoppel against complainant, have utterly failed to show that she did not know the deed to her homestead without the signature of her husband, was a void thing.

As to subdivision (b), "If his title were duly of record" are we precluded here? No. On page 88 of the record, Mr. Mose Rosenbaum, one of the defendants, in response to cross interrogatory, said he made no effort to find out in whom the title to the land rested on which he took his deed of trust, and that he did not examine the records of the county to find out if the title was in Mitchem. So far as he knew, when he took his deed of trust the county records may have shown the title to have been in Mrs. Blackwell.

Subdivision (c) Did defendants rely upon anything complainant said or did, or left unsaid or left undone? They did not. Mr. Mose Rosenbaum at page 90 of the record, testified as follows: "Q. Was Mrs. Blackwell anywhere around when the trade between you and Mr. Mitchem was made? A. No, I don't think she was. Q. Did you know Mrs. Blackwell at all? A. I may have seen her—I don't know as I do."

Then what was it the defendants relied upon, that the complainant said or did, or did not say; or did not do when they took their deed of trust on the land in question?

The defendants sold the live stock and some other property to Mitchem, took a deed of trust back on it for the

purchase price, added the land as an extra precaution, taking the chances on the title being in the Mitchems, and expecting the debt to be paid.

Under this record the chancellor could not have found other than he did. There was no other result that could have been reached.

And so we respectfully submit that the case should be affirmed by this honorable court.

E. B. Williams, for appellee.

The deed signed by Amanda P. Blackwell and not signed by her husband, purporting to convey her little forty-acre homestead to I. W. P. Mitchem and his wife, whether it was actually delivered or not, was a nullity and conveyed no estate at all. Nor does it convey anything, even if afterwards the Blackwell husband and wife were divorced by a formal decree of a competent court having full jurisdiction.

Let us see if the appellee, Mrs. Blackwell, is estopped by her conduct towards these appellants from asserting her title to her pitiful little forty-acre homestead.

For rules of estoppel that might be applicable in a case like the one at bar, see *Scottish-American Mortgage Co. v. Albert N. Bunckley et al.*, 88 Miss. 641; see, also, *Yazoo Lbr. Co. v. Alice B. Clark et al.*, 95 Miss. 244, Both of which are equity cases. Keep in mind that estoppel was set up as affirmative matter by the appellants in their cross-bill in the case at bar, and hence the burden of proof is on them. The appellants prove by the witness McDonald that appellee did not know what her rights were after she had signed the deed to her father and mother, she thought she had conveyed the title homestead to them. Appellee herself testifies that she did not see the deed of trust given by the Mitchems to Rosenbaum, which was the cause of this law suit, and McDonald says she was not present when the mules were bought and was not present when the deed of trust was executed.

Mose Rosenbaum testified that as far as he knew he was not acquainted with Mrs. Blackwell. He did not sell her any mules. He testified also that he did not examine the records of Lauderdale County, to find out where the title to the forty acres rested. Mrs. Blackwell neither said nor did anything, nor did she omit to do or say anything that induced Rosenbaum to sell to Mitchem the mules that started this row; Rosenbaum did not know she was in existence, she was not considered one way or the other in the transaction. Her credit was not an element in the trade, nor whether she worked as a share cropper or a field hand, or lived in the house with her father and mother, or lived in a tent under a pine tree, did not work an estoppel against her—her family relationship does not affect this case one way or the other, so far as estoppel goes, because the Rosenbaums did not know that Mrs. Blackwell lived on the face of the earth. So we insist, the appellants have shown no one of the things that would estop us from setting up our title against them.

STEVENS, J., delivered the opinion of the court.

This action was instituted by appellee as complainant in the court below. Appellee seeks to cancel a commissioner's deed executed by a special commissioner of the chancery court to appellants in pursuance of a decree granted appellants in a case foreclosing a certain deed of trust held by them against I. W. P. Mitchem and wife, father and mother of appellee. The Mitchems executed a trust deed to appellants on forty acres of land in Lauderdale county, claimed and herein sued for by appellee. On foreclosure of this trust deed in chancery, appellants bought in the land. Appellee was not a party to the foreclosure suit, and now questions the title of appellants.

The point relied upon by appellants is the averment and contention that appellee is estopped to deny the validity of appellants' trust deed and their title claimed there-

under. At the time this trust deed was executed, appellee was the owner of the land in question, and she, her father, and her mother were living together on this land and in the same house. It is contended she knew the trust deed was being given by Mitcham and made no objection. The record shows that some four years prior to the execution of the trust deed, appellee had signed and acknowledged a deed conveying this land to her father and mother. But appellee contends: First that this deed was never delivered; and, secondly, even though delivered, the deed was void because of the non-joinder of the husband. The chancellor held that the deed had been delivered, but was void because the land at that time was the exempt homestead of Mr. and Mrs. Blackwell, and the husband did not join in the conveyance. It is practically conceded by appellants that this holding of the chancellor was unquestionably correct. At the time the trust deed was executed, however, the land no longer constituted the exempt homestead of appellee.

The testimony of Mose Rosenbaum, a member of appellants' firm, is conclusive against appellants on the question of estoppel. It is shown that there were no conveyances of record reflecting the ownership of this land; that appellants admit they made no effort to find out in whom the title stood; that Mr. Mitcham represented that it was his land, and they relied upon his statement; that they did not examine the records of the county or make any other investigation to ascertain who the real owner was; that Mrs. Blackwell was not present when the trade with Mitcham was made; that appellants had no knowledge of the void deed executed to Mr. and Mrs. Mitcham; and that appellants had no dealings with appellee whatever. They, therefore, in no wise relied upon anything that appellee did or failed to do. Our court has uniformly drawn a distinction between mere silence and active encouragement. So far as appellants knew, Mr. Mitcham had not been invested by appellee with any *indicia* of ownership. Appellee did not request Mr.

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Statement of the Case.

Mitcham to buy the mules. For all the evidence reflects, Mitcham would have traded with and given appellants the trust deed, regardless of the wishes or even existence of appellee.

Affirmed.

SOUTHERN RY. CO. v. ELDER.

[70 South. 549.]

NEW TRIAL. Grounds. Newly discovered evidence.

Where a judgment was rendered against a railroad company for the conversion of a shipment of cattle, and defendant made a motion for a new trial on the ground that since the rendition of the judgment, it had discovered that the cattle which plaintiff claimed to have shipped over its road, were sold by him to another party prior to the date of the shipment and defendant showed due diligence in discovering such evidence, a new trial should have been granted.

APPEAL from the circuit court of Tishomingo county.
HON. CLAUDE CLAYTON, Judge.

Suit by W. C. Elder against the Southern Railway Company. Judgment for plaintiff, and on motion for new trial overruled, defendant appealed.

Appellee brought suit against the appellant in an action of conversion. He alleges that he delivered certain cattle to the appellant for transportation, and the appellant failed to deliver them at the point of destination or to turn them back to appellee. He recovered judgment in the circuit court. Afterwards appellant filed a motion for a new trial on the ground of newly discovered evidence, and filed affidavits in support of the motion, which set out that appellant could show by affiants that the

cattle which appellee claims were shipped over appellant's road had been sold by appellee to another party prior to the date of shipment. Appellant also alleges that his failure to procure this evidence at the trial was due to the fact that he was taken by surprise on the trial, for the reason that appellee had testified about cattle not referred to in his declaration. The court overruled the motion for a new trial, and an appeal is prosecuted.

Lamb & Warriner, for appellant.

We think the trial court erred in overruling our motion for a new trial in view of the testimony that the appellant can now produce and that the same was an abuse of discretion on the part of the trial court.

In the case of *Vanderburg v. Campbell*, 64 Miss. 95, this court says: "The discretion exercised in granting a new trial is governed by legal rules rather than by mere will or pleasure of the judge."

We are familiar with the rule that only in exceptional cases will a new trial for newly discovered evidence be granted when the same is cumulative, but we submit to the court that the evidence as set out in the motion for a new trial is not cumulative, but is entirely newly discovered evidence on an entirely different point to what the appellant had cause to believe it had to meet from the declaration of appellee.

In the language of the court in the case of *Insurance Co. v. Betbeze*, 98 Miss. 265, in which it says "on the whole record we think the court should set aside the verdict and grant a new trial. "Now, to say the least of it, the contention of the appellee in this case is very, very unreasonable and does not look right; as stated before there is something wrong in this case. Now, the testimony offered in support of the motion for a new trial will shed an entirely different light on this transaction, and we feel safe in saying will result in a verdict for appellant.

We do not think it can be contended that the evidence offered in support of the motion for a new trial, is cumulative, for cumulative evidence is evidence on some point put in issue which has already been testified to. The point as to whether or not Elder had the carload of cattle at Latham's pasture on the 17th day of February, as he contends, is the governing point in this case, and one which appellant had no way to know would be testified to by Elder until the same was done on the witness stand. Now, the gist of this action is did Elder have the cattle at Latham's pasture? If he did not, then he did not turn the cattle over to the appellant. The evidence offered by the appellant on the part of Coyle endeavored to show that Elder did not have the cattle.

This court in the case of *Williams v. State*, 99 Miss. 276, says: "Evidence which would tend to establish the disputed fact by other circumstances is not cumulative, but corroborative."

The evidence in this case is bound to be unsatisfactory to this court and the real issue in this case must be left in doubt as the record now stands. The question then is, will the newly discovered testimony on another trial of this case put an end to the doubt and finally and conclusively dispose of the matter? We respectfully submit to the court in our judgment that it will, and a different conclusion will be reached by the jury. The very unreasonableness of Elder's contention in this suit is bound to arouse the suspicion of the court that there is fraud somewhere, and from the record it points more conclusively to Mr. Elder than to any one else. We ask the court's careful investigation of this record and we believe that we can safely assert that the court will agree with us after having done so, that this case is a most extraordinary and unusual one.

This court in the case of *Railway Co. v. Crayton*, 69 Miss. 159, said: "Where the evidence upon which a case was originally tried was unsatisfactory and the real issue was left in doubt and newly discovered evidence

was offered which will clearly put an end to the doubt and finally and conclusively dispose of the litigation, certainly, and otherwise than on the former trial, the duty of the court would be to award the new trial."

J. A. Cunningham and J. E. Berry, for appellee.

The issue was tried on the evidence produced, and the jury found for appellee, and now we see appellant adroitly trying to shift the issue of Latham's pasture in order to get up some newly discovered witness with information to afford them a new trial. This is certainly cumulative, and would merely afford appellant an additional witness to contradict Elder about having seventy-five head of cattle on February 17. All this is merely contradictory. The issue in this cause is *whether the cattle were delivered as alleged*, and witnesses *who ought to have been produced are those who witnessed the transaction at the station*, and they cannot lie down on so grave and pertinent a question of defense, and after neglecting to bring in witnesses easily accessible, then set aside a verdict because of some flickering sidelight. Why did they not bring witnesses who had knowledge of the question in point? This dereliction certainly had its weight with the court below, and highly justifies the action of the court. If appellant had paid any respectful attention to the young man's claim, and had investigated it in the usual course, they would have been fully advised of the previous whereabouts of the cattle in controversy. Nowhere does this record show that appellee ever kept anything hidden from the company, or refused to furnish them any information at his hand. 29 Cyc. 886-4; Cyc. 882, 29 Cyc. 892 (b) also authorities cited above.

If the courts of this country should set aside verdicts and follow aggrieved litigants off into the various ramifications of the issues of the cause, no end could ever come of litigation. Appellees had before them an abundance

of witnesses as to whether or not Elder loaded a car of cattle for the appellant on the time alleged, and if his efforts were a fraud upon the company, appellant could have certainly convinced a jury out of the multitude, by examining witnesses present, that this boy was swearing falsely, and the question of Latham's pasture would have made no difference. But having laid down on the main issue, they now seek by faint drum beats to change the field of the contest and go to miniature quarters and pitch their tents where it can be said that they were not derelict in the former procedure.

Cook, J., delivered the opinion of the court.

A careful reading of this record convinces us that the trial court erred in overruling the motion of appellant for a new trial. We believe that the record shows no lack of diligence on the part of appellant, and it is evident that with the newly discovered evidence before it, another jury might reach a different verdict.

Reversed and remanded.

PEARCE v. DEGRAFFENREID.

[70 South. 561.]

REPLEVIN. *Sale of property. Collateral attack. Defective trust deed.*
Title.

Where P. sold certain machinery to S. and took a deed of trust on the same to secure a part of the purchase money and S. failed to pay, and the trustee under the trust deed instituted replevin under which the property was seized by the sheriff and sold to P., under Code 1906, section 4229, providing for the sale of property too expensive to keep, and after the levy under the replevin writ, execution was issued on a judgment in an action by D. against S. and placed in the hands of the sheriff, and P. filed his claimant's affidavit in the execution proceedings, and

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D., contended that the trustee had not been legally appointed and that the description of the property in the trust deed was void for uncertainty. In such case D. could not question the validity of the judgment in the replevin suit; and as the replevin writ and the sale thereunder were void on the face of the record, and since P.'s lien was transferred from the property to the proceeds of the sale, P.'s title acquired by the sale was good as against D.

APPEAL from the circuit court of Lauderdale county.

HON. J. L. BUCKLEY, Judge.

Suit in replevin by W. C. Sams, as trustee in mortgage to W. W. Pearce, against J. P. Sparling, in which the sheriff sold the property under Code 1906, section 4229, and the mortgagee became the purchaser at the sale, while the property was in the hands of the sheriff, execution was issued on a judgment obtained by R. S. DeGraffenreid, against J. P. Sparling, and W. W. Pearce filed a claimant's affidavit in the execution proceedings and his claim being rejected and judgment being entered on his claimant's bond, he appeals.

The facts are stated in the opinion of the court.

Baskin & Wilbourn, for appellant.

The peremptory instruction for appellee was wrong and should have been given for appellant for the following reasons: First, the deed of trust from Sparling to Pearce was prior in time and record to appellee's judgment, and was not void for insufficiency of description, nor was it shown to have been paid, nor could appellee object to any irregularity in the appointment of W. C. Sams, substituted Trustee.

Second, even if the description of the trust deed were void, and it was not, still the proof is that appellee knew of it before he obtained judgment, and that the debt was for balance of purchase price.

Third, appellant by his purchase at the sale of the property by the sheriff under section 4229, Code 1906, in the replevin suit acquired a good title thereto, and appellee

could only look to the proceeds of such sale; and this too regardless of the merits of the replevin suit.

Fourth, appellee must fail because title was shown in L. E. Campbell.

Fifth, it was made perfectly clear there was no title in J. P. Sparling at the time of the recovery of appellee's judgment nor at the date of the execution and its levy.

Sixth, appellee's attachment was quashed and he acquired no lien thereby.

Seventh, appellant had a prior lien for purchase money, a prior recorded deed of trust, which gave him priority over Campbell, as well as appellee, and he bought and paid for the property at the sale by the sheriff under section 4229, Code of 1906, of which appellee had notice.

Eighth, neither the verdict nor the judgment assessed the articles separately, and there was absolutely no proof of separate valuation.

We submit that this record bristles with errors against appellant, and that the case should be reversed and judgment rendered in this court for appellant, which we respectfully ask.

T. V. Brahan, for appellee.

W. C. Sams' substituted trustee appointment was irregular and illegal, under the clause of the deed of trust, which provides, for the neglect or refusal of the trustee named therein, W. G. Hodges, then the *cestui que trust* might by written endorsement thereon, appoint another trustee, etc., and this was not done. The deed of trust was the contract between the parties, and unless the substitution was made accordingly, it was illegal and void. See 53 Miss. 119; 70 Miss. 825; 61 Miss. 397; 73 Miss. 713; 85 Miss. 277; 79 Miss. 455 and page 175, ib; 88 Miss. 64; 77 Miss. 433; 74 Miss. 729. It therefore follows that the substituted trustee had no authority to act in any respect.

The plaintiff in execution had a valid judgment against Sparling rendered on April 11, 1912, which was enrolled

on May 2, 1912, and it became a lien upon and bound all the property of the defendant within the county from the rendition thereof, etc. See section 819 of the Code of 1906, and annotations.

Plaintiff's execution was issued on May 17, 1912, and was received by the sheriff on May 20, 1912, and was levied on the machinery on the same day, as fully appears *ante*. and his counsel pointed out the machinery to the sheriff and gave him the proper description, as appears by his return, but he neglected to advertise and sell it on ten days' notice, or before the pretended replevin sales, and afterwards delivered the property to Pearce on his filing the claimant's affidavit and bond. Therefore, I submit that the plaintiff had the prior, valid lien against the property, and was entitled to have it subjected to the payment of his judgment, and the court properly granted him the peremptory instruction.

Counsel for claimant assign for error the refusal of the court to reopen the case for him, to prove the substitution of the Trustee Sams, and then allowing the plaintiff in execution to recall the officers to prove the value of the machinery; but this was all in the discretion of the court, and I submit the court was right in both rulings, because the Sams' substitution was illegal under the provision of the deed of trust, and it was proper at any time before verdict to have amended or proven the officer's return as to the facts.

STEVENS, J., delivered the opinion of the court.

Appellant, W. W. Pearce, was claimant in the circuit court of Lauderdale county of certain machinery levied on under an execution issued upon an enrolled judgment recovered and owned by appellee against one J. P. Sparling. Judgment was rendered against W. W. Pearce and the sureties on his claimant's bond, and from this judgment the claimant and his said sureties appeal.

In July, 1911, Mr. Pearce, the owner, sold the property in question to J. P. Sparling, and took a deed of trust to secure five hundred dollars of the purchase money. This trust deed was duly recorded. Mr. Sparling failed to pay the purchase price, and thereafter W. C. Sams, as substituted trustee in said deed of trust, demanded possession of the property, and, failing to obtain possession, instituted an action of replevin to recover possession and to foreclose the trust deed. The writ of replevin was duly issued and levied April 26, 1912; and the sheriff, after making his return on the writ, proceeded to advertise the property for sale under and by virtue of section 4229, Code of 1906, claiming it was necessary to employ a watchman to guard and protect the property, and that the property levied on was too expensive to keep. After this property was levied on under the writ of replevin, execution was issued on the enrolled judgment of appellee against J. P. Sparling, and was placed in the hands of the sheriff May 20, 1912. The property was sold on May 25, 1912, under the provisions of section 4229 aforesaid, and appellee was the highest and best bidder. He failed to pay the bid, however, and the property was readvertised for sale and resold June 10, 1912, under the statute mentioned, and, at the second sale, appellant bid in the property, and the same was struck off to and delivered to him. Appellant thereupon filed his claimant's affidavit in the execution proceedings, and gave bond with his coappellants as sureties. Issue was thereafter made and joined and the cause proceeded to trial, resulting adversely to appellant.

The first assignment of error submits that the court below erred in granting a peremptory instruction to appellee and in refusing a peremptory instruction in favor of appellant. Appellee contends that the description in the deed of trust, held by appellant against J. P. Sparling, is void for uncertainty, and also that W. C. Sams, plaintiff in replevin, was not legally appointed as substituted trustee. The replevin suit was, however, pro-

secuted to judgment; and the plaintiff in that suit recovered a judgment by default against J. P. Sparling. It is undisputed that appellant bought and paid for the property in question at the sale made by the sheriff under section 4229 of the Code of 1906 in the replevin suit.

Under our construction of the statute in question, appellant acquired a good title to the property at the sale made by the sheriff under the statute. By the terms of this statute, the money realized by the sheriff at the public sale stood, after the sale, in lieu of the property. The writ of replevin was lawfully issued, and the property in question lawfully taken in possession under the writ of replevin; and appellee is in no position to question the validity of appellant's judgment in the replevin suit. The sheriff, being lawfully in possession of the property, was by the express terms of section 4229 empowered to make sale of it; and by the further expressed provisions of the statute, "the proceeds of the sale, after payment of proper expenses, shall be in lieu of the thing sold." The statute contemplates, of course, that only one sale should be made; and, unless the purchaser takes the property freed of and not subject to the execution issued and served subsequently to the issuance and service of the writ of replevin, then a valid sale could not, under such circumstances, be made at all under the statute, and the beneficent provisions of the statute in such case could not be availed of. Appellant, in our judgment, took a good title at the sale in question; and the peremptory instruction, instead of being in appellee's favor, should have been in favor of appellant.

Let the judgment of the court below be reversed, and judgment entered for appellant.

Reversed.

TOWN OF WAVELAND v. HANCOCK COUNTY.

[70 South. 561.]

HIGHWAYS. Road taxes. Dispositions.

While Code 1906, sections 4433 and 4469, relating to taxes collected directly for working public roads, provides that one-half of the tax collected on property within a municipality shall be paid to such municipality for street purposes, yet where under Law 1901, chapter 150, the board of county supervisors issued bonds for road purposes, and levied and collected an *ad valorem* tax on all taxable property of the county, including property in a town which worked its own streets, the town was not entitled to one-half of the taxes collected upon Urban property, since such tax was levied in the interest of the bondholders and must be paid to the owners of the bonds.

APPEAL from the circuit court of Hancock county.

HON. JAS. H. NEVILLE, Judge.

Claim by the town of Waveland against Hancock county, the claim being rejected by the board of supervisors, claimant appealed to the circuit court, and from a judgment of the circuit court confirming that of the board, it again appeals.

The facts are fully stated in the opinion of the court.

Robert L. Genin, for appellant.

The town bases its claims for said *pro rata* share of the money collected by the county, on section 4469 of the Code of 1906. The county was working its roads under sections 4465 to 4475 inclusive, in connection with chapter 150 of the Laws of 1910. There is no doubt that if the county had collected a direct *ad valorem* tax on the property of the municipality for the purposes of working the county roads outside of the municipality, that the county would be compelled to return to the town, one-half of the amount collected.

This was settled in the case of the *City of Holly Springs v. Marshall County*, in 104 Miss. 752.

But if the county borrowed money for road purposes and collected an *ad valorem* tax to pay the indebtedness, would the same rule apply? Manifestly so, because the *ad valorem* tax is collected for the same purpose under the same law in the same manner from the inhabitants of the municipality, and the town derives no additional benefit.

The tax collected in the instant case from the inhabitants of the municipality, may be considered by the county as a bond tax, but in truth and in fact, it is a tax assessed and collected according to the valuation of the property and therefore, an *ad valorem* tax.

The object and purpose of the law enacted by the legislature was to equalize the burden of road building and maintainance between the individuals who pay for their own roads in the city and his urban neighbor and citizen. The wording of the statute is plain, unambiguous, and fully expressive of the intent of lawmakers.

Now can this entire equitable scheme be defeated and the burden double on the tax payer within the municipality simply because the board of supervisors borrowed the money to do their road work? In other words, the law is, that half of the *ad valorem* tax collected out of a town for road purposes by the county, should be returned.

But Hancock county says: "Oh no; you have no right to that half, now, because this is an *ad valorem* tax collected to pay a debt incurred for road purposes." If this rule was sanctioned by the courts, the county could work the roads continuously under sections 4465 and 4475 inclusive, by constantly borrowing the money to do the work, and defeat the very object and intention of the law.

I do not believe that our courts will uphold such juggling of the law and the non-payment of this obligation

simply because the county desired the money in advance to do the road work.

The court held in the case of the *Town of Blue Mountain v. Tippah County*, decided by the supreme court on May 3, 1915, that the town had no right to recovery because they sued for money derived from a sale of bonds before the county had levied and collected any *ad valorem* tax from the inhabitants of the municipality. That case and the case at bar are essentially different. In our case we ask for one-half of the *ad valorem* tax actually collected from the inhabitants of the municipality of Waveland, and used by the county for the purpose of paying the indebtedness (bonds) incurred for road purposes, not one cent of which was spent in the town.

The court by *dictum* in the *Blue Mountain Case supra*, stated there a proposition, not presented, in the following words: "Money which will be collected from the taxpayers of a town, will of course, have to be paid to the owners of the bond." That rule may be applied in this case, yet would not bar the Town of Waveland from recovery because the board of supervisors of Hancock county are presumed to know the law, and of operating the business of the county to conform thereto, and it must be presumed that the amount due the Town of Waveland out of the *ad valorem* tax that they contemplated collecting by the county from the inhabitants of Waveland must and should have been foreseen and the proper provision by them made to refund that amount. Whether this was done by reserving out of the original amount acquired by the sale of bonds, or by some other special provision, or out of some other general fund, is a matter that should have received advance attention.

McDonald & Marshall, for appellant.

In 1892 a general legislative scheme was adopted authorizing counties to work roads by contract and to impose an *ad valorem* tax not to exceed one mill any one

year, in the event the labor of the hands and the commutation taxes and fines were insufficient to accomplish the work. The section authorizing the letting of the roads or a division thereof is 3929, Code of 1892, and the section authorizing the *ad valorem* tax levied on all the property of the county not to exceed one mill was section 3931, Code of 1892. We find for the first time in the laws of Mississippi the general power to levy taxes on property for road purposes in the Code of 1892 and in said section we find this provision:

“Taxes collected on property within a municipality the streets of which are worked at the expense of the municipal treasury, or worked by municipal authority shall be equally divided between the County Road Fund and the Municipal Street Fund.”

Evidently the one mill tax was insufficient, because we see in the laws of 1897, page 20, authority to the board of supervisors, for the purpose of paying off any indebtedness on account of the Road Fund, to levy a tax of one mill for the years 1896 and 1897, in addition to that then authorized by law, and also containing this provision:

“Taxes collected in incorporated cities or town, shall be divided as provided in section 3931 of the Annotated Code.”

The legislature enacted chapter 119, Laws of 1900, page 153, which while limiting the maximum rate of taxation to one mill, broadened the scheme and authorized inspections of the road by the board of supervisors, and the appointment of a county road commissioner at a monthly salary. It had the same scheme of distribution to municipalities.

We see in the Code of 1906, sections 3929 and 3931 of the Code of 1892, brought forward as sections 4441 and 4443. However, in the Code of 1906, sections 4465 to 4475 inclusive embrace a complete scheme for the working of roads by contract, the appointment of a Commissioner, the requirement of eight days' labor, the levying of a commutation tax and the imposition of an *ad va-*

lorem tax. The scheme in the Code of 1892 in the Laws of 1900, and of the Code of 1906, had no effect in any county until put in operation by an order of the board of supervisors. This was a sly way of getting it enacted into law, and is the gauntlet that most progressive legislation has had to run.

Section 4469 of the Code of 1906, authorized a commutation tax and an *ad valorem* tax, which is to be kept as a separate road fund, and requires the commutation tax collected from residents of a municipality to be turned over to the treasurer of such municipality to be expended for street purposes and that "one-half of the *ad valorem* tax collected on property within a municipality shall be paid over to the treasurer thereof, in cases where the streets are worked at the expense of the municipal treasury, or worked at the expense of municipal authority."

So we see from the first legislative act passed in 1892, authorizing the imposition of an *ad valorem* tax, one-half of such tax collected on property within a municipality, working its streets at public expense, and the whole of the commutation tax collected from residents of such municipality, was required to be turned into the treasury of the municipality for street purposes. Commenting on the reason and policy of this mode of distribution the supreme court of this state, in *McComb City v. Pike County*, 91 Miss. 745, says:

"Because the streets are worked by the municipality and are no burden to the county; and, this being the case, it was but just that the municipality should have one-half of the amount raised by taxation of its property for road purposes, when it was keeping its own roads without expense to the county, and also contributed to the maintenance of the county roads. The reason for the exception in behalf of a municipality is that it is maintaining its own streets without any burden to the county, a thing which no other part of the county does. This is the reason why only one-half the tax collected for road

purposes is required to be paid to the county. The reason does not lie in the mere fact that the money is paid out of the municipal treasury to keep up the streets, but that they are kept up without burden to the county."

Thus the obvious purpose of the legislature in making such provision was that in all cases where any municipality assumed the exclusive burden of working its own streets by money appropriated out of its own treasury, its tax-payers should not be subject to an *ad valorem* tax, all of which was to be used on the county roads. It was recognized as an universal and immemorial custom for all municipalities which maintained streets to do so by the labor of its citizens or by their commuted labor and it was also recognized as manifestly unjust and unequal that urban inhabitants should be required to work on country roads, and, at the same time, keep up the streets for their municipality.

However, all these questions have been set finally at rest by the decision in the case of the *City of Holly Springs v. Marshall County*, 104 Miss. 752.

But the instant case involves a demand for one-half of the *ad valorem* taxes collected on property within the municipality of Waveland for the years 1911, 1912, 1913, and 1914, for the purpose of creating a fund to pay interest on road bonds, and creating a sinking fund for their liquidation, issued by Hancock county, the proceeds of which bonds have been entirely expended on the county roads in said county, and not one cent of which has been expended or returned to the town of Waveland.

Is there any distinction, under the law, to be drawn between bonds sold by a county and the proceeds used on public roads, and taxes imposed annually in a county, and the amounts realized being expended on the public roads of that county? The theory, policy and very corner-stone of the law is that one-half of the *ad valorem* taxes collected on property in a municipality which works its own streets, for road purposes, shall be re-

turned to that municipality, and the reason and theory of the law is not to be perverted by whipping the devil around the stump and attempting to do, indirectly, what the law prohibits done directly. Section 4469 requires one-half of the *ad valorem* tax to be paid to the town. This was and is an *ad valorem* tax. The fact that it was imposed to pay interests on bonds and create a sinking fund does not make it less an *ad valorem* tax. The nature of the tax is not changed by the use to which it may have been intended. This tax in controversy was a special tax to be used exclusively in paying the interest on said bonds and providing a sinking fund for their redemption, however, if Waveland be entitled to one-half of the amount paid on her property the fact that it was paid into the county treasury and is carried in this special fund, does not prevent this action, because it was improperly paid into the county treasury, instead of being paid to the Town of Waveland and, is not legally a part of said fund.

To admit, as the law says, that one-half of the *ad valorem* tax imposed for roads on property in a municipality, which works its streets, must be turned into the treasury of the municipality by the county, but if it is levied to pay road bonds the proceeds of which have been expended exclusively on county roads, then none of the tax is returned to the municipality, is overturning the policy spirit and the letter of the law. This position is not in conflict with the opinion of the supreme court in the case of the *Board of Aldermen of the Town of Blue Mountain v. Board of Supervisors of Tippah County*, decided by the Supreme Court on May 3, 1915. In that case, Blue Mountain was suing for a proportion of the money derived from the sale of road bonds without any assessment having been made and before any *ad valorem* taxes had been collected on the property in said municipality. Of course, this could be done because the thing that the municipality is entitled to have returned, is one-half of the actual *ad valorem* taxes paid by it, and until

paid there was nothing, under the law, for it to legally make demand for. This independent sentence is in the opinion in that case:

"The money which will be collected from tax-payers of the town will, of course, have to be paid to the owners of the bonds."

The application of taxes to be collected was not involved in that case. However, said statement can only mean that one-half of the money collected on property in the town will have to be paid to owners of the bonds.

E. J. Gex, for appellee.

Assuming that there is something in the contention of appellant that they are entitled to the money asked for, let us for the sake of argument see where this money is going to come from. Can they collect this money from the money that the county has raised by providing for a sinking fund to pay off this indebtedness and to pay interest? We think not, as the bondholder would come in and say you can't do this as I bought your bonds on the faith of section 331 which says that "you shall levy annually a Special Tax, to be used exclusively in paying the interest on such bonds, and in providing a sinking fund for their redemption." Any other use of said money would be defeating and nullifying of said section. And this court very recently realized that any such thing could not be done when it said through Cook, J., in the case of *Blue Mountain v. Board of Sup. of Tiptah County*, 68 So. 250: "The money which will be collected from the tax payers of the town will of course have to be paid to the owners of the bonds."

One of the attorneys for appellant (see brief of R. L. Genin, page 3), realizes the seriousness of this proposition but tries to overcome this objection by saying, "That rule may be applied in this," speaking of the above opinion of COOKE, J., "yet would not bar the Town of Waveland from recovery because the board of Super-

visors of Hancock county are presumed to know the law, and of operating the business of the county to conform thereto, and it must be presumed that the amount due the Town of Waveland out of the *ad valorem* tax that they contemplated collecting by the county from the inhabitants of Waveland, must and should have been foreseen and the proper provision by them made to refund that amount. Whether this was done by reserving out of the original amount acquired by the sale of bonds, or by some other special provision, or out of some other general funds, was a matter that should have received advance attention." I have set this out in full so that we might find according to appellant's contention, or any other contention as to how or where money is to come from to pay Waveland if they are entitled to said money. Surely it cannot be contended that this very bond issue could be used to pay Waveland (*Blue Mountain v. Tippah County, supra*), and for the further reason that this money cannot be used for any other purpose than issued for. Then could the money be taken out of the General Fund? What would be the effect if Waveland was paid out of the General Fund? The result would be that Waveland would file another claim against the county for one-half the amount paid it because we had paid a road debt out of money that it had helped pay and had not received its one-half from, and this would continue for ever, with claim after claim.

Another thing that occurs to us is that section 4469 provides for a limit of three mills for road purpose and of which the city is to get one-half of the money collected within the city limits providing the city worked its own road. If the levy made to pay off bonds had to be divided cities instead of receiving one-half of three mills would in some cases get as much as five and six mills, something never intended by the legislature. Lets presume another case. Suppose Hancock county was working under the overseer system when bond issue was made and spent one-half of the bond issue under the

overseer system when the county decided to change its system of working the roads from the overseer system to the contract system. What portion of the amount to be collected would have to be turned over to the city that worked its own road? Again suppose when the bond issue was made that the county was operating under overseer system and had spent all of its money while operating under that system and changed to contract system, then would the city be entitled to anything and if so to what? If it was the intention of the legislature to give to cities working their own roads one-half of the money collected from the said cities, why did the legislature enact chapter 174 of the Laws of 1912, and why should chapter 255 of the Laws of 1914, be enacted? We are frank to admit that these are questions that we cannot answer and are questions that will have to be answered before appellant can get any money?

To make section 4469 elastic enough to cover contention of appellant would mean the abolishing of section 331 of Code and the repealing of *Blue Mountain v. Tappah, supra*, and the stretching of section 4469 to such a point that the party that drew up the said statute would not recognize it if it stared him in the face; things which we do not believe this court will do.

STEVENS, J., delivered the opinion of the court.

The municipality of Waveland presented to the board of supervisors of Hancock county for allowance a claim for two thousand, seven hundred and seventy dollars and sixty-one cents, being one-half of *ad valorem* taxes collected for the years 1911, 1912, 1913, and 1914 on the taxable property within the corporate limits of said town to pay the interest on certain road bonds issued by Hancock county and to create a sinking fund for the liquidation of said bonds. The claim of appellant was rejected by the board of supervisors, and on appeal to the circuit court the order of the board was affirmed, and from

this judgment of the circuit court affirming the action of the board of supervisors, appellant prosecutes this appeal.

The agreed statement of facts shows that the board of supervisors of Hancock county, by an order passed September 7, 1910, adopted chapter 150, Laws of 1910, for working the roads of said county, and continued to work and maintain its roads under said chapter, and amendments thereto, until August, 1914, when it put into operation the provisions of sections 4465 to 4475, Code of 1906, as an additional method for working its public roads. In September, 1910, the board issued bonds for road purposes in the sum of one hundred thousand dollars, and the proceeds were credited to the road fund of the county and expended in the construction and working of roads outside of the town of Waveland, which works its own streets. The board levied and collected for the years 1911, 1912, 1913, and 1914 an *ad valorem* tax on all of the taxable property of the county for the purpose of paying the interest on said road bonds and of creating a sinking fund for the retirement of said bonds. From taxable property situated in the town of Waveland the net sum of five thousand, five hundred and forty-one dollars, and twenty-two cents was collected for the years mentioned, and one-half of this sum appellant demands under sections 4433 and 4469, Code of 1906.

The taxes provided for by sections 4433 and 4469, Code of 1906, are taxes collected directly for working the public roads, and the proceeds of these taxes are credited to the proper road fund and expended on roads. These statutes expressly provide that one-half of the tax so collected on property within a municipality shall be paid to such municipality for street purposes. The tax, for a portion of which a demand is here made, was not levied under either of said sections of the Code, and was not levied to raise funds to be spent directly upon the roads. The tax here in question was levied to pay interest on road bonds and to create a sinking fund there-
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for. There is no statute authorizing any portion of this tax to be paid to a municipality. In the absence of such statute, the board of supervisors of Hancock county, of course, had no authority to allow the claim here presented by appellant. There must be statutory authority justifying such allowance. The validity of the tax imposed on property within the corporate limits of the municipality is not involved. This tax has been levied and collected, and the owners of taxable property within the town have borne the burden without question. The town in its corporate capacity now makes claim in nature of a refund for a proportionate part of this tax. As indicated by this court in the case of *Board of Aldermen of the Town of Blue Mountain v. Board of Supervisors of Tippah County*, 68 So. 250, the money here involved is to be paid to the owners of the bonds. It was levied in the interest of the bondholders.

We think the action of the circuit court was correct, and its judgment is affirmed.

Affirmed.

McFARLAND v. STATE.

[70 South. 563.]

1. JURY. *Administering. Oaths. Record. Criminal law.*

Where in a murder case the minutes of the trial court recites that twelve jurors were sworn, but named only eleven and a second order in the case named twelve, but did not recite that they were sworn, in such case the record sufficiently showed that twelve jurors were chosen and sworn, the errors being manifestly clerical.

2. CRIMINAL LAW. *Appeal and error. Presumptions.*

In the absence of an affirmative showing to the contrary, it will be presumed on appeal that the jury in a criminal trial was sworn.

APPEAL from the circuit court of Carroll county.

HON. H. H. RODGERS, Judge.

Nathan McFarland was convicted of murder and appeals.

The facts are fully stated in the opinion of the court.

F. M. Glass and *R. F. Kimmons*, for appellant.

Ross A. Collins, attorney-general, for the state.

Cook, J., delivered the opinion of the court.

Appellant was indicted for murder, convicted by the jury, and sentenced to be hanged by the circuit court of the second district of Carroll county. In accordance with the practice of this court in cases wherein the death penalty is imposed, each member of the court has read the entire record of the evidence taken in the trial court and the brief of counsel for appellant.

We have reached the conclusion that no error of law was committed by the trial court, but, inasmuch as it is so earnestly insisted that the record discloses appellant was tried by an unsworn jury, we have decided to discuss this assignment of error.

The argument is based on the recital of facts contained in two orders entered upon the minutes of the trial court. Omitting that part of the court's orders not pertinent to the points made in this court, we quote as follows from the order entered May 19th, viz.:

"This day this cause came on for hearing, and the district attorney, who prosecutes for the state in this behalf; being in open court, and the defendant, Nathan McFarland, being in open court in his own proper person and represented by counsel, and being rearraigned, and having had read to him the bill of indictment filed herein against him for the murder, enters his plea of not guilty thereto, and for his trial puts himself upon the country, and the district attorney doth alike, for the is-

sue joined, whereupon the state was called upon as to being ready for trial, announced ready for trial, whereupon the defendant was called upon as to being ready for trial, whereupon, the defendant having his witnesses called, all answered present, including the witnesses Neely Greer and Lenius Biles, who were mentioned in the defendant's written motion filed for a continuance at a former day of this term of court, whereupon the defendant announced ready for trial, whereupon the court proceeded to impanel the jury from the persons summoned by the special *venire facias* aforesaid, whereupon the following named twelve good and lawful men of said county, to wit: E. M. Hovis, J. O. Adams, T. N. Merriweather, Jr., T. E. Bell, J. T. Buchanan, J. F. Bole, S. T. Carpenter, J. M. Grant, J. C. Day, N. A. Delap, W. W. Wilson. . . ."

Again, we quote from the order entered May 20th, as follows:

"This day this cause came on to be heard, thereupon came the district attorney, who prosecutes for the state in this behalf, and the defendant, in his own proper person and represented by counsel, and both announcing ready for trial, and the defendant being arraigned according to law and entering a plea of not guilty as charged in the indictment, thereupon came a jury good and lawful men, to wit, E. M. Hovis, J. L. Adams, T. N. Merriweather, Jr., T. E. Bell, A. B. Ruscoe, J. T. Buchanan, J. F. Bole, S. T. Carpenter, J. M. Grant, J. C. Day, N. A. Delap, W. W. Wilson, who after hearing all the evidence and argument of counsel *pro* and *con*, and receiving the instructions of the court, retired in charge of their proper bailiffs to consider of their verdict, and, after due deliberation, returned into open court the following verdict, to wit: 'We, the jury, find the defendant guilty as charged.' "

It will be noted that the order of May 19th names eleven jurors and recites that they were sworn. It will be observed that the order of May 20th omits to say that the jurors named therein were sworn, and also adds another

and additional juror to those listed in the first order. There was no claim made in the court below that all of the members of the jury were not sworn. This question is raised for the first time in this court. It is perfectly manifest to our minds that there is a clerical omission of the name of one of the jurors in the first order. The order recites that "twelve good and lawful men" were sworn, but in listing by name the twelve one name is omitted, and this is made clear by the second order. Appellant was represented by able lawyers in the trial court, and we know, as ordinary men, that they would not have permitted this point to pass over, if, as a matter of fact, one of the jurors was not sworn. But, if we are precluded from using our common sense in the performance of our judicial functions, happily the legislature has taken care of just such situations as this record reflects.

The rigor of the common law caused humane judges, far in advance of the times, to scan the records of criminal trials with jealous regard for the lives of convicted criminals, but in our times the penalty for the violation of the laws bears some relation to the nature of the offense, and therefore, the legislature has swept away many of the obsolete rules of the common law. This court, in *Hays v. State*, 99 Miss. 153, 50 So. 557, has, in our opinion, settled the question raised on this appeal.

The second order made in this case by the trial court expressly recites the names of the twelve jurors who tried appellant, but is silent as to whether or not the twelve were sworn, and this court, in the *Hays Case*, has said that we must presume that the jury was sworn, unless it affirmatively appears that it was not sworn.

Affirmed.

McCALEB ET AL v. McCALEB ET AL.

[70 South. 563.]

1. APPEAL AND ERROR. *Presentation for review. Assignment of error. Briefs. Suggestion of error. Issues as to cost. Parties.*

Where a question is not raised by assignment of error nor mentioned in brief of appellant, it need not be considered by the supreme court on appeal.

2. SUGGESTION OF ERROR. *Issue as to cost. Parties.*

Where, on suggestion of error after affirmance of a judgment providing that fees paid out of the county treasury to persons summoned as jurors should be taxed as cost in the cause, the only question presented is as to the taxation of such cost, and it appears that the controversy is between appellants and the county, and that appellees are not interested therein, the mandate will be withheld and the cause retained so that appellants may file an assignment of error raising such point and a copy thereof served on the attorney-general, and time will then be given to file briefs.

APPEAL from the chancery court of Harrison county.

HON. J. M. STEVENS, Chancellor.

, Suit between Chas. McCaleb and others and Annie L. McCaleb and others. From a judgment the first parties mentioned appeals.

The facts are fully stated in the opinion of the court

Neville & Moss, for appellant.

Mize & Mize, for appellee.

SMITH, C. J., delivered the opinion of the court.

PER CURIAM. *Affirmed.*

ON SUGGESTION OF ERROR.

This is an appeal from a decree against appellants on an issue *devisavit vel non* in the court below. The

order in the court below allowing the fees of the persons summoned as jurors to be paid out of the county treasury contained also a provision that "the allowances aforesaid, together with all other costs in this cause, be taxed as costs in this cause and included in the judgment to be entered in the disposition of this cause." Appellants now suggest that we erred in affirming the judgment of the court below in so far as this item of court costs is concerned, and to that extent judgment should be reversed.

The question here presented was not raised by the assignment of error, and is not referred to in either of the briefs filed by counsel for appellants upon the original hearing of this cause, so that it was not presented to us for adjudication, and therefore we committed no error in affirming the decree of the court below. While this court has the right on its own motion to raise questions not included in the assignment of error, it is not called upon, and ordinarily does not pass upon any question not raised thereby; so that the suggestion of error must be overruled.

The question here presented, however is one with which appellees have no concern, and is really a controversy between appellants and the county of Harrison. This being true, the mandate will be withheld and the cause retained so that appellants may within ten days file an assignment of error raising the point here in question, serving a copy thereof upon the attorney-general; appellants' brief to be filed within one week after the filing of the assignment of error; the brief of the attorney-general, should he desire to reply thereto, to be filed within one week thereafter; and appellants' reply to be filed within five days after the filing of the attorney-general's brief.

The matter will then be passed upon by the court without a further formal submission of the cause.

MARYLAND CASUALTY CO. v. GRACE.

[70 South. 577.]

1. INSURANCE. Accident insurance. Right of assignees. Contract. Execution. Evidence.

The assignee of a claim for damages under an accident insurance policy has no greater right and no superior claim than that possessed by the assignor.

2. INSURANCE. Accident insurance. Contract. Execution. Evidence.

Where the local agent of an accident insurance company mailed a policy to the insured, who refused to accept it or pay the premium but failed to return the policy, and notified the agent to cancel it and supposed the agent had done so, and there was no evidence that the premium had ever been paid to the company, in such case the company was not liable for a claim for damages to assured which was assigned by him after the expiration of the policy and upon which suit was brought by the assignee.

APPEAL from the circuit court of Leflore county.

HON. MONROE MCCLURG, Judge.

Suit by M. B. Grace, an assignee of D. C. Jones, against the Maryland Casualty Company. From a judgment for plaintiff, defendant appeals, and plaintiff prosecutes a cross-appeal from an order vacating a prior default judgment in his favor.

The facts are fully stated in the opinion of the court.

Gardner & Whittington, for appellant.

M. B. Grace, for appellee.

STEVENS, J., delivered the opinion of the court.

Appellant prosecutes an appeal from a judgment for three hundred and twenty-five dollars rendered against it by the circuit court of Leflore county in favor of appellee, and based on an alleged claim assigned to ap-

pellee by one D. C. Jones. Miss Pauline Melton, the local agent of appellant at Greenwood, Miss., forwarded by mail, January 16, 1912, to D. C. Jones, at Money, Leflore county, Miss., the accident policy sued on. Mr. Jones declined to pay the premium of twenty-five dollars on this policy; and in January, 1913, Miss Melton brought suit against Jones in the justice of the peace court for the alleged premium due on the policy. When her suit came on for trial at Money, Miss Melton was represented by M. B. Grace, an attorney at law, appellee herein, and the defendant was represented by counsel. Before the trial of the case in the magistrate's court, a written agreement in settlement and compromise of the suit was entered into as follows:

"For and in consideration of M. B. Grace paying Miss Melton the sum of twenty-five dollars (\$25.), the sum she is suing me for, and all court costs, and dismissing the cause, I do hereby agree to fill out the notice of the accident to the Maryland Casualty Company and fill out and sign the several blanks; and I assign all my right, interest and title in and to the said claim, in consideration of the above, to M. B. Grace, and, if the said draft is issued in my name, I agree to indorse and assign same to M. B. Grace, and, if the claim is turned down by the company, I agree to bring suit in my name for the use of M. B. Grace, and prosecute the suit to judgment, M. B. Grace to represent me without cost to me, and, in case of judgment, to indorse the voucher or draft sent me in settlement of suit or judgment, if I get a judgment, and I agree to appear and testify in said cause where same may be filed and do all in my power to assist M. B. Grace to collect the claim.

"Signed this the January 29, 1913.

"[Signed] D. C. JONES.

"Witnessed:

"[Signed] J. G. GILLESPIE."

Mr. Jones thereupon filled out the regular blanks provided by Miss Melton, giving notice to the company of

an alleged accident and making proofs of certain alleged injuries claimed to have been sustained by him in October, 1912, and for which he demanded the sum of three hundred and twenty-five dollars. Appellant declined to pay the claim, or any part thereof, and this action was thereupon instituted by M. B. Grace, as assignee. Issue was joined and the plaintiff, in support of his claim, introduced Mr. Jones himself as his first witness. This witness was interrogated about the policy in question, and denied altogether accepting the policy of insurance, the basis of the claim here sued on. Extracts from his testimony are as follows:

“Q. At the time you were injured, tell the jury whether or not you had this policy of insurance I hand you. A. I did not know it was in force, I had canceled it. Q. The policy of insurance was in your possession at that time? A. Yes, sir; that policy was there, but in the meantime I had canceled it. Miss Melton never told me to return it when I told her to cancel it. . . . Q. You had a conversation with her about the matter? A. No, sir; she asked me about the policy and I told her I would let her know, and in about ten days I received it. Q. You accepted it? A. No, sir. . . . Q. Mr. Jones, Miss Melton brought suit for the premium on that policy, did she not? A. Yes, sir. . . . Q. Where at? A. Before the magistrate at Money. Q. Who was the attorney for Miss Melton? A. You were.”

CROSS-EXAMINATION.

“Q. Mr. Jones, I understand you to say Miss Melton sent this policy to you? A. Yes. Q. What date? A. I don't remember the date. She asked if I wanted the policy and I told her I would let her know when I had more time. Q. You got it through the mail? A. Yes. Q. Did you tell her to send it? A. No. Q. Did you know it was the policy? A. Yes. Q. What did you do? A. I told her I did not want it. Q. What else? A. I told her to cancel it. Q. How long after you received it?

A. About a week. . . . Q. What did you do after you found she had issued it? A. I told her to cancel it, I did not want it. . . . Q. Is it not a fact that this assignment was made at the suggestion of Mr. Grace as the attorney for Miss Melton? A. Yes. Q. Is it not a further fact you did not make any claim on this policy until Mr. Grace brought suit, and suggested that you assign it to him? A. No, sir; not until after that. Q. Is it not a fact you did not make any claim of liability on the company until Mr. Grace had you make this assignment? A. Yes."

The witness in this and other portions of his testimony tells the court frankly that he never had any contract with appellant; that although Miss Melton forwarded him the written policy, he notified her that he did not want the policy and asked her to cancel it, and that he considered the policy canceled. He states further that he never would have made any claim under the policy if Mr. Grace had not requested him to do so, and that he did it purely and simply to avoid the lawsuit in the justice's court over the premium. The testimony of Mr. Jones was followed by that of Mr. Grace in his own behalf and by the testimony of Dr. Sandifer with reference to an ulcer or sore on the ankle of Mr. Jones. The declaration charged that Mr. Jones was thrown from his horse and injured. Mr. Jones in his testimony with reference to the alleged injury stated that while riding horseback a cane "was thrown from the stalk in my ankle" and "bruised my ankle and caused a sore on it." The alleged injury, according to the plaintiff's testimony, occurred October 3, 1912, and no claim was presented to the company therefor until some time after the written agreement was entered into between appellee and Mr. Jones.

When plaintiff rested his case, appellant, as defendant in the court below, moved to exclude the plaintiff's evidence, and to grant it a peremptory instruction. This motion was by the court overruled, and the defendant

thereupon rested his case. A peremptory instruction was requested by both parties, and the court, on the question of liability, gave a peremptory instruction requested by appellant. While there are several assignments of error, and a cross-appeal prosecuted by appellee based upon the action of the court in setting aside a default judgment rendered on a previous day of the term and permitting appellant to defend the suit, it is only necessary to consider the assignment of error based upon the action of the court in overruling motion to exclude the plaintiff's evidence, and to grant a peremptory charge in favor of appellant.

Appellee unquestionably has no greater rights and no superior claim than that possessed by Mr. Jones, the alleged holder of the policy. The testimony of Mr. Jones is decisive against the assigned claim of appellee. While the record is silent as to whether the agent, Miss Melton, was charged by the company with the premium, and as to whether the company actually received the premium from its agent, the proof is uncontradicted that Jones declined to accept the policy, requested its cancellation long before the alleged injury, and treated the policy as never in existence. The policy, on its face, expired January 15, 1913, unless renewed. At no time during the one year from the date of its issuance did Mr. Jones by any word or act ratify the alleged contract or accept the policy. At the time he compromised the lawsuit brought by Miss Melton against him in the justice's court and entered into the written agreement with appellee, the policy, if ever in existence, had expired. It is manifest that had no suit been filed against Mr. Jones for the twenty-five dollar premium, no demand would have been made by him for any injury alleged to have been covered by the policy. According to the testimony of Mr. Jones, it was the unusual and questionable offer made by the private counsel of the company's agent that brought forth the present lawsuit; and it is upon the evidence in support of his own trade that appellee's claim must

stand or fall. In our judgment, no liability whatever was shown, and the peremptory instruction should have been given appellant.

The views here expressed make it unnecessary for us to comment upon the assignment of errors presented by the cross-appeal.

Let the judgment of the lower court be set aside, and the suit dismissed.

Dismissed.

AMERICAN INSURANCE CO. v. CRAWFORD.

[70 South. 579.]

1. INSURANCE. Actions. Defenses. Forfeiture. Burden of proof and error. Harmless error. Instructions.

In a suit by insured against an insurance company where the insurer defended on the ground that its policy had been forfeited because the insured secured other insurance in violation of its provisions and the insured replied admitting the existence of the additional policy, but denied that he knew of it or accepted it or that it had ever been in his possession, the burden of proving that the second policy was accepted by the insured was on the insurer, since the replication of assured was merely a denial of the essential averments of the insurers plea under the general issue.

2. APPEAL AND ERROR. Harmless error. Instructions.

Even though instructions given plaintiff and defendant are conflicting, if such instructions are more liberal to the party complaining than he was entitled to, it was harmless error.

3. APPEAL AND ERROR. Harmless error. Instructions.

When a fact is admitted an erroneous instruction as to the burden of proof in establishing such fact was harmless.

APPEAL from the circuit court of Leflore county.

HON. MONROE McCLURG, Judge.

Suit by J. W. Crawford against the American Insurance Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

McLaurin & Armistead, for appellant.

There was a conflict in the instructions given to the plaintiff and the defendant in their application to conflicting testimony. This is fatal error.

To illustrate, take the second instruction for Crawford (Record page 52), wherein the jury was told that although they might believe that there was a Philadelphia Underwriters' Policy in existence at the time of the fire, yet the jury would find for the plaintiff, unless they believed that the policy was issued with the knowledge and consent of the plaintiff, or that the plaintiff authorized the issue of the said policy, or had knowledge of it, that is, unless the jury believed that the plaintiff authorized the issuance of the policy, or had knowledge or its issuance, thereby excluding the idea that the plaintiff might be bound by the existence of the policy even if he had not authorized its issuance, provided, he had notice of its existence after it was issued.

The fourth instruction is erroneous also, for the jury is there instructed that the burden of proof was on the defendant to show that the Philadelphia Underwriters policy had been issued, when this fact had been confessed in the defendant's reply to the notice under the general issue.

Instruction four is also erroneous because it instructs the jury that the burden of proof was on the defendant to show that the Philadelphia Underwriters' policy was issued with the knowledge and consent of plaintiff; also, that he, Crawford, accepted it afterwards or had knowledge of it afterwards.

Plaintiff assumed the burden to show by his reply that he, plaintiff, had no knowledge of the issuance of this policy by the Philadelphia Underwriters; and that he never accepted it, or had knowledge of it after it was issued, so we say that this instruction is right in the face of the burden assumed by the plaintiff.

This instruction is in direct conflict with instruction number 1 given to the defendant, see record page 57; also the instruction number 3 given to the defendant, record page 58.

We therefore, say that instructions given to the plaintiff were erroneous, or at least those that we have commented on, and furthermore that they were in conflict with instructions given to the defendant, and for these reasons the court erred in overruling the motion for a new trial.

As stated in the case of *Solomon v. Compress Co.*, 69 Miss. 319, and particularly on page 326: "Facts and law may be confessed by the pleadings; and, by confessions so made, litigants must be bound, to the extent, at least of the controversy on which they are made."

Plaintiff by his reply to the notice under the general issue, admitted the issuance of the policy in the Philadelphia Underwriters, and assumed the burden of proving that it was never issued by his knowledge or consent, or retained by him after its issuance, and plaintiff's instructions shifted this burden, or undertook to do so to the defendant.

Our court in this same case, *Solomon v. Compress Co.*, *supra*, 69 Miss. 328, has said: "The court then gave directly conflicting instructions (which conflict alone created error) that the plaintiff might recover on the third count if the facts therein stated and relied upon, as estopping the defendant from denying that he was assignee of the term, were proved."

"By the sixth and eleventh instructions for the plaintiff, the court also told the jury that the plaintiff should recover upon states of fact applicable neither to the is-

sue joined under the second count, nor to the matter of estoppel set up by the third count.

"If the sixth and eleventh instructions are sought to be applied to the first count, there will be direct and palpable conflict between these instructions and the first and second instructions for the defendant."

The same doctrine as to conflict of instructions has been repeatedly announced by this court, see *Southern Railroad Co. v. Kendrick*, 40 Miss. 374; *Chapin v. Cope-land*, 55 Miss. 476; *Henderson v. Henderson*, 41 Miss. 584; *I. C. Railroad v. McGowan*, 92 Miss. 603.

We respectfully submit therefore that this case ought to be reversed: First, on the facts; second, because erroneous instructions were given to the plaintiff; third, because the instructions were conflicting; and fourth, because the court overruled defendant's motion for a new trial.

Gardner & Whittington, for appellee.

The counsel in their brief undertake to say that appellee in his reply to the defendant's notice to the general issue, "undertook to confess and avoid the effect of the affirmative matter set up in defendant's notice." We are a little surprised at this statement of counsel, who are, ordinarily very fair. By no possible construction can the reply notice which was filed to the notice of the general issue be distorted into a "confession and avoidance," of defendant's notice to the general issue. Appellee confessed nothing. The defense set up by defendant was an affirmative one, and necessarily carried with it the burden of proof in establishing it before the jury. This, we take it, is an elementary proposition, and to quote an authority to substantiate it, would be to insult the intelligence of this court. Appellee confessed nothing, but replied that the alleged "additional policy," was issued without his knowledge and consent, and that he never had any knowledge of its existence, and, we sub-

mit, was properly determined by the jury in a verdict in favor of appellee. On this point see specially *Miller v. Phenix Insurance Co.*, 100 Miss. 311.

A casual examination of appellant's brief, we think, will satisfy this court that it is a labored effort on the part of appellant to make some sort of pretense for taking this appeal.

We can hardly believe that counsel for appellant are serious in some of their criticisms of the instructions given for appellee in this case. To illustrate: They say that the fourth instruction given for appellee was erroneous, as it instructed the jury that the burden of proof was on the defendant to show that the "additional policy" was issued with the knowledge and consent of the plaintiff, and that appellee accepted it afterwards or had knowledge of it afterwards. If this is not the law, we are at a loss to understand the decision of this court in the case of *L. L. & G. Insurance Company v. Farnsworth Lumber Company*, 72 Miss. 555. The court there holds that "The burden is on the insurer to establish a breach of warranty in a policy of insurance. There is no distinction in this respect between Life and Fire Insurance." 57 Miss. 308. Then any "affirmative defense" necessarily carries with it the burden of proof to establish that defense.

We call the court's attention, however, to the fourth instruction given for appellant, the defendant, which is not the law—never was the law, and never will be the law—and nobody knows it better than appellant, to wit:

"The jury is further instructed that unless you believe that a preponderance of the evidence does show that plaintiff never authorized the issuance of the said policy in the Philadelphia Underwriters Company—never had notice of its existence, and never deposited it for safe keeping with a third party, you will find for the plaintiff."

This instruction required the appellee to show by a preponderance of the evidence that he never authorized

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the issuance of the said policy, and never had any notice of its existence and never deposited it for safe keeping with a third party. In other words, this instruction placed upon the plaintiff, the appellee, "the burden of proof" to disprove the "affirmative defense," set up by appellant or defendant, which burden should have been borne by appellant.

The court granted defendant three liberal instructions, in fact more than it was entitled to, and yet, in the face of these instructions, and the conflicting testimony, the jury brought in their verdict for plaintiff, for the amount sued for. We submit that the verdict of the jury will not be disturbed as there is nothing in the testimony to indicate that the verdict is excessive or irregular or improper in any way. It was peculiarly the province of the jury to settle the conflict in the testimony by their verdict, and having done so, we take it that their verdict will not be disturbed by this court, and we take it further, that in any view of this case, that the instructions granted defendant were such as to liberally present its defense, and that it is now too late to complain of any conflict in the testimony, when all of the testimony, and the whole record shows that justice has been done, and a substantial right sustained. We respectfully submit that the verdict of the jury is right; that if there was any error in any instruction granted for appellee, that the same was cured by the instructions given for appellant, and especially the instruction just quoted. We, therefore, respectfully ask for an affirmance of the judgment of the court below.

POTTER, J., delivered the opinion of the court.

J. W. Crawford, appellee here, was plaintiff in the court below, and filed his suit against the American Insurance Company, the appellant, in the circuit court of Leflore county.

The suit was brought on a fire insurance policy issued by the appellant for three hundred dollars on certain

household furniture owned by the appellee and situated in the city of Greenwood, which furniture it was alleged in the declaration was destroyed by fire, and that the plaintiff suffered loss in the full sum of the policy, three hundred dollars.

The defendant pleaded the general issue and set up in the notice thereunder that by the terms of the contract sued on there was a warranty binding on the plaintiff in the policy issued by defendant, as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

And the defendant offered in this pleading to show on the trial of the case that, without any permission by agreement indorsed on the contract or otherwise, the plaintiff, subsequent to the issuance of the contract sued on, caused to be issued or accepted and permitted the issuance of a policy covering identically the same matter with another company for the sum of three hundred dollars, or did knowingly permit such policy afterwards issued to remain in existence up to the time of the fire.

To the notice of affirmative matter under the general issue, the plaintiff filed a replication in effect admitting that the additional policy for three hundred dollars mentioned in the notice under the general issue was issued, but denying that it was issued with his knowledge or consent; denying that he ever had knowledge of the existence of the policy; denying that it was ever in his actual or constructive possession; and denying that he ever paid or promised to pay any premium for the issuance of the policy; and alleging that as soon as he was notified that such policy had been issued that he notified the company having issued it through its agent that he had no claim whatever on account of it, as the same was issued without his knowledge or consent.

The testimony in the case is conflicting. Mr. Crawford testified in his own behalf that the second policy on his household furniture was not issued at his request; that he knew nothing about it until after the fire; that he had never promised to pay the premium thereon; and that if the policy was mailed to him that he never received it. The agent for the insurance company on the other hand testified that the policy was issued at the request of Mr. Crawford, and that he promised to pay for it, and in fact on one occasion handed him a ten dollar bill in payment of the premium on the policy, which was not received because the proper change could not then be made. The only other testimony in the case is of one witness who testified that Crawford kept certain papers in the safe of the compress company with which the witness was employed as a bookkeeper, and that this policy was among the papers. He did not know of his own knowledge whether Crawford knew that the policy in question was in the safe at the compress company before the fire, but he did state that Crawford said at one time after the fire that he knew of the existence of the policy, and at another time that he did not know of it; and another witness who in his testimony produced the envelope in which the policy in question of the Philadelphia Underwriters was mailed to Crawford. This envelope shows that it was addressed to Crawford in care of the Tallahatchie Compress Company, and that it was mailed, as shown by the post office mark, on September 10, 1910. The above is practically all the testimony in the case. The case was submitted to the jury, and a verdict was found for the plaintiff for the full amount of the policy, three hundred dollars.

The appellant urges that the plaintiff in his replication undertook to confess and void the effect of the affirmative matter set up in defendant's notice under the general issue because the plaintiff, while not denying the issuance of the policy pleaded by the defendant, set up in his replication to the general issue that such policy was issued

without the knowledge or consent of the plaintiff; that he never knew of the existence of the policy; that it had never been in his actual or constructive possession; and that he had never paid or promised to pay any premium for the issuance of said policy, and that therefore the burden of proving these matters was on the plaintiff.

This contention of appellant, however, is not sound. When the appellant in its notice under the general issue set up the existence of another policy of insurance on the same property in violation of a warranty contained in its policy, it assumed not only the burden of showing that such policy was issued, but that Crawford accepted it. In other words, the defendant having set up the policy in question as an affirmative defense, the burden was on it to show it was either issued at the request of Crawford or that he afterwards ratified its issuance by, in some way, making known an intention on his part to accept the policy. The replication is nothing more than a denial by the plaintiff of the essential averments in the defendant's plea under the general issue. *Insurance Co. v. Farnsworth*, 72 Miss. 555, 17 So. 445; *Insurance Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446.

It is true that the instructions are conflicting to the extent that the jury are instructed on the one hand that the burden of proof with reference to the essential averments in the defendant's plea is on the plaintiff, and in another that the burden of proof as to these same matters is on the defendant. But in view of the fact that it was the defendant's affirmative plea, the burden was properly on it, and it cannot complain because the instructions received by it were more liberal than it was entitled to.

It is complained that the fourth instruction is erroneous, for by it the jury is instructed that the burden of proof is on the defendant to show that the Philadelphia Underwriters' policy had been issued when this fact had been confessed in the defendant's reply to the notice under the general issue. This could not have been detrimental to the defendant's case because the issuance

of the policy was an established fact, and was so treated by both parties to the controversy on the trial of the case.

We are of the opinion that the case was fairly and properly submitted to the jury on a controverted question of fact, and it is therefore affirmed.

Affirmed.

ELZEY v. STATE.

[70 South. 579.]

CRIMINAL LAW. Appeal. Venue. Judicial notice.

On an appeal to the circuit court from a conviction of a misdemeanor by a justice of the peace, it is necessary for the state to show the venue of the offense, and where the only proof of venue was that the offense occurred within a named city it was insufficient, since the court cannot take judicial notice of what justice's court district a named city is in. The districts of a county being determined by order of the board of supervisors of the county, and by such order may be and are sometimes charged.

APPEAL from the circuit court of Harrison county.

HON. JAS. H. NEVILLE, Judge.

Samuel Elzey was convicted in a justice of the peace court for abandoning his wife, and being again convicted on appeal to the circuit court, he again appeals.

The facts are fully stated in the opinion of the court.

Mize & Mize, for appellant.

The record shows that appellant was married on the 19th day of August, 1914, and that they lived together about eleven or twelve days. This was an appeal from the justice court of J. W. Farrish, the justice's record

being found at pages 2-10 of the record, the affidavit being found at page 2, showing that the affidavit was made in justice district number 1 of Harrison county, Mississippi; and in the trial of the case in the circuit court the state must prove that the crime took place in the justice district in which the affidavit was made. *Monroe v. State* 103 Miss. 759; *Coon v. State*, 13 S. & M. 246; *Thompson v. State*, 51 Miss. 353; *Isabel v. State*, 101 Miss. 371.

These cases hold that this question can be raised for the first time in the supreme court, because it is a matter of jurisdiction. However, this was raised in the lower court, and the court's specific attention was called to it by the peremptory instruction requested by appellant and also by the motion for a new trial as shown at page 18 of the record.

The fact that the witness testified that appellant and his wife separated in Biloxi, Mississippi, does not cure this error, nor can the court take judicial knowledge of what justice district the city of Biloxi is in, because the districts of a county are a matter of regulation by the board of Supervisors of each particular county and are regulated by orders placed on the minutes and can be changed at the will of the supervisors, so that a town might be in one district one month and the next month be in a different district, their authority being derived under sections 4111 and 4112 of the Code of 1906.

So we submit that a peremptory instruction should have been given for appellant. It was therefore error for the court to give the instruction for the state found at page 11 of the record and to overrule appellant's motion for a new trial found at page 18 of the record, no jurisdiction being shown to the court.

Ross A. Collins, attorney-general, for the state.

The case originated in the court of the justice of the peace but on the trial of the case in the circuit court appellant contends that jurisdiction of the court below

is not shown, the only testimony in regard thereto being on page 24 of the record when a witness was asked the following question: "Where was she living when he left her? Answer: Biloxi, Mississippi." Nothing is shown as to the trial in the court below, nor is it shown that Biloxi is in the first district of said county, therefore the question decisive of this case is, whether or not the court may take judicial notice of the fact that Biloxi is in the first district of said county.

I have diligently sought to relieve the court of this burden by going into an exhaustive study of the authorities in the hope that I might find a case exactly in point, but I confess that I have been unable to do so, though it would seem that this question must necessarily have been often encountered, conceding it to be true that courts do not, unless provided by statute, take judicial cognizance of municipal ordinances, does it necessarily follow that an analogous reasoning is to be applied to the establishment of the supervisors districts in a county? The orders entered of record in establishing such districts, while not in the usual sense public statutes relate to matters of general interest and therefore are not strictly of local concern within the purview of the decisions denying judicial notice in matters strictly of local concern. Circuit courts would undoubtedly take judicial notice of the geographical position of all the political divisions of a state, such as counties, cities or villages and towns or townships and the limitations and boundaries therefore in so far as the same are prescribed by public statutes, and I submit that a court of general jurisdiction, such as the circuit court should take judicial notice of an act of a local or inferior court such as merely concerns the general public. The statutes (sections 4111 and 4112) delegate to the boards of supervisors the authority to prescribe the boundaries of the five districts of a given county and it is reasonable to suppose that a court of general jurisdiction will take cognizance that this authority has been prescribed in a definite manner and will, if the

manner therefore be not known to the court, ascertain from the prescribed orders the requisite facts.

"State courts take judicial notice of administrative regulations of considerable notoriety established by important state boards, such as supervisors, but judicial notice will not be taken of subordinate regulations concerning the internal management of an office, or the regulation of inferior boards, such as canal, civil service, or fish commissioners." 16 Cyc. page, 903.

In conclusion, I submit that this question is determinative of the case under consideration, and in the light of the foregoing, I respectfully submit that the case should be affirmed.

POTTER, J., delivered the opinion of the court.

This case originated before a justice of the peace in the city of Biloxi in Harrison county. Appellant having been convicted of vagrancy in the justice's court, in that he deserted his wife without cause, appealed to the circuit court, and, again having been convicted, he appeals to this court.

The only question in this case is whether or not the record shows that the justice's court had jurisdiction of the case when tried there. The only testimony found in the record as to where the defendant was alleged to have deserted his wife is as follows: "Q. Where was she living when he left her? A. Biloxi, Miss."

In the trial of the case in the circuit court, it was necessary for the state to show affirmatively that the alleged crime was committed in the justice of the peace district in which the affidavit was made. It is only necessary to determine, therefore, whether or not the circuit court can properly take judicial notice of what justice's court district the city of Biloxi is in. The districts of a county are determined by order of the board of supervisors of the county, and by such order may be and sometimes are changed. There is no public act establishing the boun-

daries of a supervisor's district, from which justices of the peace are elected. We are of the opinion that the court cannot take judicial notice of the supervisor's district in which a town or city is situated. *Backenstoe v. Wabash, etc., R. R. Co.*, 86 Mo. 492; *Mayes v. St. Louis, etc., R. R. Co.*, 71 Mo. App. 140.

The venue in this case was not sufficiently proven, and the case is therefore reversed and remanded.

Reversed and remanded.

COLLINS v. UNION AND FARMERS' BANK.

[70 South. 581.]

1. **COMPROMISE AND SETTLEMENT.** *What constitutes. Effect. Appeal and error. Objections below. Necessity. Trial. Action for deposit. Instructions. Applicability to evidence. Banks and banking. Demand.*

The receipt by a depositor of a check from a bank for a balance of sixty-five cents to which he was admittedly entitled, and which the bank sent with a notice closing his account on account of the small balance, does not work a settlement of the depositor's demand, for nine hundred dollars for which he had already brought suit, claiming that the bank had wrongfully charged his account with a check for that amount, which check he claimed was a forgery.

2. **APPEAL AND ERROR.** *Objections below. Necessity.*

Where a depositor, in an action against a bank for the amount of an alleged forged check which was charged against his account, did not as required by Code 1906, section 1974, verify his replication by affidavit denying that he signed the check, the bank cannot on appeal complain of the receipt of testimony on this point when it made no specific objection on this ground in the court below to such evidence.

3. **TRIAL.** *Action for deposit. Applicability to evidence.*

When a depositor sued a bank claiming that it improperly charged his account with a forged check, and the bank claimed that the

check was genuine, an instruction that there could be no recovery if the depositor did not promptly notify the bank of the forgery, so that it might recover against its correspondent, was not warranted by the evidence where the depositor promptly notified the bank and assisted one of its officers in attempting to trace down the forgery, and especially since the bank contended that the check was signed by the depositor.

4. BANKS AND BANKING. *Action by depositor. Demand.*

In such case, a written demand was not necessary for the payment of the amount of the forged check before suit, in view of the fact that the bank through its officials, had denied its liability for the amount, and had denied that the plaintiff had this amount on deposit.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Suit by A. B. Collins against the Union & Farmers' Bank. From a judgment for defendant, plaintiff appeals. The facts are fully stated in the opinion of the court.

R. E. Halsey, for appellant.

We think the judgment in this case ought to have been in favor of Collins. The defendant failed to prove, according to our judgment, by a preponderance of the evidence, that the check bore the signature of Collins. Collins denied the signing of the check, and we think the bank failed to overcome his evidence. We further think that all of the instructions given to the defendant were clearly wrong, and not the law, and served to prejudice the jury against Collins. Instruction number 3 reads as follows:

"The court instructs the jury for the defendant that if they believe from the evidence that the defendant bank mailed to the plaintiff the sum of sixty-five cents, in full settlement of plaintiff's account with said bank, and that said sum was accompanied by a letter of the cashier of defendant bank, stating that said sum closed the account, and that said letter and said sum of sixty-five cents were received by plaintiff, and accepted by him, and retained by him, then that was a final settlement of the account, and the plaintiff is not entitled to recover in this action."

This instruction ought not to have been allowed by the court for the reason the instruction fails to show the date of the letter claimed to have been mailed the plaintiff, and there was no proper testimony to prove the mailing of such a letter. In addition to this the instruction is clearly wrong, and should not have been given for the reason the letter and statement were claimed to have been mailed on September 1, 1911, Collins living fourteen or fifteen miles in the country. Our recollection is defendant testified it registered this letter to Collins, but it produced nothing to show it had done such a thing. The court will bear in mind Collins filed his declaration in this case on the 23rd day of August, 1911, and service was had on the bank on the 25th day of August, 1911, so this statement, and this letter sent September 1, 1911, occurs to us to have been offered to manufacture testimony, and the instruction should not have been allowed because the statement was mailed, if it was mailed, after suit had been filed and service had on the defendant. Anyway, to admit such testimony in a case of this sort the proof ought to be very clear and beyond dispute, because it opens the door for a defendant to manufacture, and make for himself testimony. It is so easy for the bank to say it mailed the statement, and sent the money, and produce a copy of the letter. This instruction alone must have influenced the jury, and caused them to find against Collins. For this reason we think the case ought to be reversed.

Street & Street, for appellee.

The right result was reached in this case, whether it be viewed from a legal standpoint or as a question of fact. It is right from a legal standpoint because:

(A) Under the state of the pleadings the bank was entitled to win, because it pleaded the nine hundred dollar check as a defense to the action and averred the signature to be genuine. It was not proper to have allowed Col-

lins to deny that he signed the check for the reason that he did not deny by plea verified by oath that he signed the check. Code 1906, section 1974.

(B) He retained the check and is estopped from claiming it to be a forgery at this late day, after the bank had lost the opportunity of holding the endorsers. Zane on Banks and Banking, page 266; 14 So. 335; 27 L. R. A. 426; 17 Am. St. Rep. 889. He must return the check. 47 N. E. 1009; 114 Am. St. Rep. 595.

(C) No written demand was made on the bank before suit for the payment of the nine hundred dollars and banks are prohibited from paying out money except on written demand.

As stated before, the issue in the case was presented squarely to the jury, and no authorities are cited in support of the contentions made by appellant, and if there is any error in the instructions some authority ought to be produced to show it; but, the verdict of the jury and the judgment are right on the facts. In fact, it is difficult to see how the jury could have reached any other conclusion than that the check is not a forgery, and we submit that the judgment of the circuit court ought to be affirmed.

POTTER, J., delivered the opinion of the court.

This is an appeal from the circuit court of the Second district of Jones county. Appellant, plaintiff in the court below, filed his suit against the Union & Farmers' Bank, a banking corporation in business at Sandersville, in said district and county, for nine hundred dollars for money had and received from the plaintiff. The general issue was pleaded by the defendant with a special plea setting up in defense of the suit a written statement of the plaintiff's account at the bank and alleging that the account was correct. The account rendered purported to set out all of the credits and debits of the bank with the plaintiff from October 20, 1910, the time when the account was started, until May 11, 1911, when it was

Opinion of the court.

[110 Miss.]

alleged that the plaintiff had a balance of sixty-five cents in the bank. The checks are not set out in the pleading, except the date and amount of each check.

The defendant pleaded in its special plea that on September 1, 1911, it sent to the plaintiff by mail, postage paid and properly addressed to him at his post office, the sum of sixty-five cents, in full settlement of the balance due by defendant and that on the same date it wrote plaintiff a letter, inclosing the sixty-five cents and stating that the amount closed the account. The copy of the letter was made an exhibit to the special plea. The defendant further alleged that this sum was retained and accepted by the plaintiff in full settlement of his account. The plaintiff filed a replication to defendant's special plea, to which the defendant filed a demurrer, which was sustained, and leave granted plaintiff to amend. Whereupon plaintiff filed his amended response to the defendant's special plea, admitting that the account as set out by defendant in its special plea was correct, except as to a check for nine hundred dollars dated at Muskogee, Oklahoma, December 12, 1910, a copy of which was made an exhibit to plaintiff's response. In this response the plaintiff charged that the check for nine hundred dollars was a forgery, and not the plaintiff's writing, and that the defendant had no right or authority to pay the check and charge same to the account of plaintiff, as it was not signed by the plaintiff or any one by his authority either directly or indirectly. He denied that he had any knowledge of the check until he called on the bank to ascertain his balance on deposit. The plaintiff denied that he accepted the canceled check with the statement of his account, and denied that he ever acknowledged the account as correct, but alleged that he promptly repudiated the check, and then and there told the bank that it was not his check, and that it should not be charged to his account. He denied that he had ever received any sum in full settlement of the account and insisted that the nine hundred dollars was still owing.

The plaintiff testified that the check was forged, and that as soon as the nine hundred dollar item was called to his attention, he so notified the bank. The defendant's witnesses testified that the plaintiff had made statements to the effect that, if he signed the check, he was "drugged," and another statement to the effect that he had given the check in payment of some horses purchased at Muskogee. The case was submitted to the jury, and a verdict was returned for the defendant.

The following instruction was given at the request of the defendant:

"The court instructs the jury for the defendant that, if they believe from the evidence that the defendant bank mailed to the plaintiff the sum of sixty-five cents in full settlement of plaintiff's account with said bank, and that said sum was accompanied by a letter of the cashier of defendant bank stating that said sum closed the account, and that said letter and said sum of sixty-five cents were received by the plaintiff and accepted by him and retained by him, then that was a final settlement of the account, and the plaintiff is not entitled to recover in this action."

The above instruction was predicated on a statement of the plaintiff's account with the defendant bank which was sent the plaintiff together with sixty-five cents in money and the following letter:

"We regret to note that your account with this bank has not been active of late; the inclosed statement showing no deposit or check since May, 11, 1911.

"You will note from the inclosed statement that a small balance of sixty-five cents is still due you by the bank. On account of this balance being so small and having to carried from day to day, we are inclosing same herewith.

"However, while this closes the account to date, we hope it will not remain closed long, and that you will again carry a balance with us.

"Thanking you for past business, and awaiting your further pleasure, we are,"etc.

We can see no just ground upon which the acceptance of the sixty-five cents inclosed with the above letter and general statement of plaintiff's account at the bank could have constituted an accord and satisfaction of the disputed item of nine hundred dollars. That the plaintiff was disputing the correctness of the charge of nine hundred dollars against him cannot be denied, because he had already filed his suit for this item. The sixty-five cents sent him was an amount in addition to this, about which there was no controversy. It is inconceivable that the plaintiff intended to settle his claim for nine hundred dollars in consideration of the payment of sixty-five cents of his own money. It is true the plaintiff retained the sixty-five cents mailed him; but he had a right to do this, as it was his own money, and there was no controversy with reference to this small balance.

The attention of the plaintiff was not directed by the above letter to the controversy with reference to the nine hundred dollar item. The nine hundred dollar item was charged on the account; but it only signified that the bank still had him charged with the nine hundred dollar item which he disputed. Not only must an offer be made in full settlement of a disputed claim, but it must be accepted as full settlement. There is nothing in the letter above quoted to call plaintiff's attention to the fact, if it were a fact, that the defendant bank was offering this sixty-five cents in money in full settlement of defendant's claim for nine hundred dollars.

The giving of the above instruction was manifest error.

It is contended by the appellee, however, that it was not proper to have allowed Collins to deny that he signed the check for the reason that he did not deny by a plea verified by oath that he signed the check, as required by section 1974 of the Code of 1906. No motion was made by the defendant in the lower court to strike out this plea, nor was the court's attention in any way called to this omission during the trial of the case. The defendant objected to any testimony denying the signature of the

check, but did not state specifically upon what ground he made this objection. If he had specifically called the court's attention to the fact that the plea in the replication was not verified as required by statute, undoubtedly the trial judge would have permitted the plaintiff to amend by then and there verifying the pleading in question. We are therefore of the opinion that, the defendant having failed to specify the grounds of his objection, the court was not in error in refusing to exclude the testimony offered. *Heard v. State*, 59 Miss. 545.

Another instruction granted the defendant is as follows:

"The court instructs the jury for the defendant that, although they believe from the evidence that the plaintiff did not sign the check in controversy, yet, if they further believe from the evidence that Mr. Collins failed to promptly and positively repudiate said check by pronouncing it a forgery, and accepted the check when delivered to him by the bank along with his statement, and kept the same, and thereby caused the bank to lose the opportunity of sending the check back to the bank from which it received same, thereby causing a loss to the defendant bank, then the jury will find a verdict in favor of the defendant."

It was error to grant this instruction, because, if plaintiff's version of the facts be true, as soon as he discovered the alleged forgery he showed the check to the cashier of the bank, and one of the directors of the bank went with him to Muskogee, with the check in their possession, for the purpose of trying to recover the money; and, further than this, there is no pretense that any demand was ever made on the plaintiff for the check. If the defendant's version of the facts be true, it would be impossible for the bank, with any degree of consistency, while insisting in this suit with Mr. Collins that the check is genuine, to make an attempt to collect from the indorsers.

It was also urged that no written demand was made on the bank before suit for the payment of the nine hundred

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dollars. This was not necessary in view of the fact that the bank, through its officials, had denied its liability for the nine hundred dollars, and had denied that the plaintiff had this amount on deposit.

For the errors above set out, this cause is reversed and remanded.

Reversed and remanded.

GUARANTY TRUST CO. OF NEW YORK v. MOBILE & OHIO
RAILROAD CO.

[70 South. 585.]

1. FRAUD. *Sale of false bill of lading. Liability to purchaser. Carriers. Ratification.*

Where plaintiff in New York purchased false bills of lading with foreign exchange attached for two shipments of export cotton of one hundred bales each, bearing certain marks, purporting to have been issued by the defendant railroad, and thereafter the alleged shipper procured the defendant railroad, which acted in good faith, to issue true bills of lading to its agent and to sign a telegram to its broker in New York, stating that it had received two export shipments of cotton of the same marks, which shipments under true bills of lading were stopped by the holder thereof, and the foreign exchange draft was never honored, and plaintiff lost the money advanced on the false bills of lading. In such case since there was no misrepresentations in the telegram, which stated the truth, plaintiff could not recover of defendant on the ground that the telegram had misled it and caused the loss.

2. SAME.

In such case since the railroad company was obliged to deliver the cotton to the holder in good faith on the true bill of lading or stop the shipment on the order of the true holder of the good bill of lading, there could not be any ratification of the forged bills of lading.

3. CARRIERS. *False bills of lading. Telegram. Liability. Estoppel.*

Under the facts in this case the sending of the telegram at the request of the shipper's agent for his accommodation by defendant's agent who was familiar with the methods by which export shipments of cotton were handled, and who knew or should have known, that the telegram was intended for the use of the purchaser of the exchange in selling it, or in disposing of the ladings, did not estop the defendant from disputing the fact that the bills of lading purchased by plaintiff were false, since the statement in the telegram was true, and its agent might presume good faith on the part of its shippers, and that no false and forged bills of lading would be offered for sale by the shipper.

APPEAL from the circuit court of Lowndes county.

HON. THOS. B. CARROLL, Judge.

Suit by the Guaranty Trust Company of New York against the Mobile and Ohio Railroad Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. J. Lamb and Wm. Baldwin, for appellant.

S. R. Price and J. M. Boone, for appellee.

STEVENS, J., delivered the opinion of the court.

On, and for a long time prior to, April 20, 1910, the firm of Stéel, Miller & Co. was engaged in the cotton business, with their principal office at Corinth, Miss. It appears that one A. L. Jones was their agent at Columbus, Miss., and in the course of their business they would buy and ship cotton to the compress at Columbus, and that the Columbus Insurance & Banking Company would furnish the money to pay for the cotton and take over as its security the compress receipts and bills of lading. The firm had a broker in the city of New York, one F. Van Gerpen, to whom they would send bills of lading covering export shipments, insurance certificates, and foreign exchange. This broker would sell sixty-day drafts upon foreign pur-

chasers of cotton, to banking establishments in New York City, assigning to the bank bills of lading, invoices, insurance, etc. The record of this case discloses that Steel, Miller & Co., on or about April 20, 1910, forwarded to its broker in New York foreign exchange, insurance certificate, and two documents purporting to be bills of lading covering, respectfully, one hundred bales marked RGCY, and one hundred bales marked RAEN consigned to Steel, Miller & Co., Bremen, Germany, via New Orleans, La. These ladings purported to have been issued by the Mobile & Ohio Railroad Company at Columbus, Mississippi, but in truth and in fact they were false and forged. Van Gerpen offered to the Guaranty Trust Company, appellant herein, these forged bills of lading and foreign exchange attached. It so happened at the time that the firm of Knight, Yancey & Co., a cotton firm of Decatur, Alabama, had failed some days prior, and on account of this big failure the exchange purchaser of appellant would not buy the paper offered by Van Gerpen until appellant should receive evidence satisfactory to it that the cotton had in fact been delivered to the railroad company for shipment. When appellant declined to buy the exchange Van Gerpen thereupon telegraphed Steel, Miller & Co. to have the railroad wire him they had received the cotton for shipment. On April 22, 1910, Mr. Jones, the agent at Columbus, acting under instructions from Steel, Miller & Co., secured compress clearances for two hundred bales of cotton for shipment, and in accordance with the usual custom himself prepared bills of lading in his office and carried them to the railroad office for issuance and execution. Mr. Jones accordingly arranged with the railroad agent for the shipment of one hundred bales of cotton marked RGCY and one hundred bales marked RAEN, consigned, routed, and marked exactly like the cotton appeared to have been shipped and marked by the forged ladings then in New York City. At the same time Mr. Jones had the agent of the rail-

road company at Columbus to sign a telegram to Van Gerpen, reading as follows:

"Columbus, Miss., April 22, 1910. F. Van Gerpen, 15 Williams St., New York. We have received for shipment to Bremen from Steel, Miller & Company one hundred marked RG CY and one hundred RA EN, routed via New Orleans. [Signed] W. E. Kennedy, Agent, M. & O. R. R. Co."

This telegram was written out by Mr. Jones, and was delivered to the telegraph company and the fee for its transmission paid by Jones. At this time neither the agent of the railroad company nor Mr. Jones, as agent of Steel, Miller & Co. knew anything of any forged ladings having been sent by Steel, Miller & Co. to Van Gerpen or of any forged ladings being in New York, and no one connected with the railroad company at Columbus had any intimation whatever that forged ladings were out, or that any one connected with Steel, Miller & Co. intended to use the telegram in negotiating any false bills of lading. The true bills of lading made out by Mr. Jones in his cotton office at Columbus were dated April 19th, but were not executed by the railroad until April 22d, three days later, and complaint is made by appellant of the action of the railrod company in antedating the true ladings. When Van Gerpen received the telegram above set out, he attached it to the same papers he had before that time offered to the purchasing agent of appellant, and on the representation of facts stated in the telegram succeeded in selling to appellant the foreign exchange, and received from appellant fifteen thousand, two hundred and forty dollars and eighteen cents. After Mr. Jones received the true ladings he turned them over to the Columbus Insurance & Banking Company which, as a holder of the true ladings, stopped the shipment of the two hundred bales of cotton covered by the true ladings and sold the cotton on the market to a third party. The cotton had not been fully loaded on the cars when the shipment was ordered stopped, and of course the cotton never

left the station in Columbus before it was disposed of by the Columbus Insurance & Banking Company. According to the testimony of Van Gerpen, the foreign exchange and forged bills of lading were sold to appellant on the 25th; and according to the testimony of Kennedy, the agent of the railroad company, instructions to hold the shipment were not given him until about three-thirty o'clock p. m. of the 25th, and then Mr. Kennedy was advised that it would be the following day before these instructions could be made definite. The record further shows that on the 26th Mr. Kennedy wired Van Gerpen that the shipment had been stopped and the true ladings recalled or surrendered. This brought to light the fact that forged ladings had been transferred, but the loss had then already occurred. The foreign exchange draft which Van Gerpen sold to appellant was never honored, and consequently appellant received nothing of value, but, on the contrary, lost the money advanced on the forged ladings. It thereupon filed its declaration in the circuit court of Lowndes county, claiming from the appellee herein the money lost by it as aforesaid. The declaration is in two counts, the first of which complains of the nondelivery of the cotton covered by the apparently valid bills of lading purchased and held by appellant, while the second count seeks to recover the fifteen thousand dollars out of which appellant was defrauded, basing the right of recovery on the allegation that appellant was misled by the telegram sent by the agent of appellee to Van Gerpen. Proper issue was joined on both counts, evidence was heard by the court, the facts as above stated were developed, and a peremptory instruction was given in favor of appellee as defendant in the court below.

It is the contention of appellant that the railroad company caused the loss complained of; that the railroad company knew, or ought to have known, that the telegram was sent for the purpose of negotiating invoices and bills of lading for cotton, and that it was wrong for

the railroad company to send this telegram. It is the further contention of appellant that after having sent the telegram it was the duty of the railroad company to hold the cotton for shipment until Van Gerpen, the party to whom the telegram was addressed, could take legal steps to protect his interests or the interests of any one relying upon the information contained in the telegram. It is the further contention of appellant that the telegram gave validity to and ratified the forged ladings then in New York.

The main point stressed in the oral argument of counsel for appellant is the contention that appellee, on the facts of this case, misled appellant and caused the loss. No action was taken by appellant against the Columbus Insurance & Banking Company or its assignee. On the contrary, it is claimed that appellant has no recourse against any one except appellee; Steel, Miller & Co. being insolvent and its estate having been administered in bankruptcy. What is it, therefore, that appellee has wrongfully done or failed to do? The request for the telegram came from the agent of Steel, Miller & Co. and not from appellant. The telegram was addressed to the broker of the shipper and not to appellant. This telegram, furthermore, stated the truth. There is no misrepresentation in it of an existing fact. The business of appellant, is, of course, to receive and transmit shipments of freight. Its duty in that regard was not violated. It, as common carrier, evidenced its contract with the shipper by and with the true bills of lading. The shipment of the two hundred bales of cotton in question was, and must necessarily be, controlled by the true ladings and the rights of the true holder of these ladings must be recognized and respected. The railroad company was obliged to deliver the cotton to the holder in good faith of the true ladings. There could not therefore be in this case any ratification of forged ladings. If the railroad company was justified in stopping the shipment on the order of the true holder of the good ladings,

how have the rights of appellant been by appellee invaded?

The question then presents itself whether appellee is in fault in sending the telegram. It must be conceded that there was nothing unlawful in the bare fact of sending this message. It was sent at the request of the shipper and for his accommodation. It stated the absolute truth. This is not a case, therefore, where the party representing a fact is afterwards estopped from denying the fact to the hurt or injury of another. But it is contended that the agent of appellee was familiar with the way foreign shipments of cotton were handled, and that he ought to have known this telegram was intended for the use of appellant in selling its paper or in disposing of its ladings. The law would accord the right, however, even to a railroad company to indulge the presumption of good faith on the part of its customers, and not require it to presume a felony had been, or would be, committed. The agent of appellee might well have thought the telegram would be of some service to Steel, Miller & Co. or to its broker in handling or disposing of the shipment of cotton actually receipted for. But just why the agent should have presumed false and forged ladings would be offered to the banking establishments of New York City it is difficult to conceive. The agent might well presume that the true ladings would be sold, and the telegram in question neither added to nor took away anything from the true ladings or the exact contract evidenced thereby. There is not the slightest proof of bad faith on the part of any of the agents or employees of appellee. Mr. Jones himself was ignorant of the false ladings. There is therefore no element of estoppel in this case.

It will be noted that this is not a contest between Steel, Miller & Co., or its trustee in bankruptcy, and the holder of the forged ladings. The rights of third parties have intervened, and their superior rights are conceded by appellant.

As a matter of fact, the loss in this case was occasioned by the false and forged ladings. With the purchase by appellant of these forged documents appellee had nothing to do. While the case of *Friedlander v. Railroad Co.*, 130 U. S. 416, 9 Sup. Ct. 570, 32 L. Ed. 991, may not be directly in point, the court in that case uses language applicable to the case at bar:

" . . . The law can punish roguery, but cannot always protect a purchaser from loss, and so fraud perpetrated through the device of a false bill of lading may work injury to an innocent party, which cannot be redressed by a change of victim."

The peremptory charge given appellee in the court below was proper, and the case is accordingly affirmed.

Affirmed.

CUMBERLAND v. STATE.

[70 South. 695.]

1. HOMICIDE. *Instructions. Malice. Burden of proof. Sufficiency of evidence. Reasonable doubt. Self defense. Opinion evidence. Conclusion. Hearsay. Trial. Rebuttal evidence.*

Where in a trial for murder the state's testimony was sufficient to sustain a conviction and the defendant's testimony made out a case of self-defense, an instruction for the state that, if the jury believed beyond a reasonable doubt that defendant shot and killed deceased, the use of a pistol was *prima facie* evidence of malice and an intent to murder, to overcome which it must be shown that at the time of the killing defendant was then in immediate, real, or apparent danger of losing his life or suffering great bodily harm from deceased, which danger must have been present and imminent at the moment of the killing, was erroneous, since in effect it shifted to defendant the burden of showing his innocence if the killing with a deadly weapon was shown.

2. SAME.

Such an instruction was further erroneous in not stating that the jury must acquit the defendant if they have a reasonable doubt of his guilt arising from the evidence or the want of evidence.

3. CRIMINAL LAW. *Reasonable doubts.*

In the trial of a murder case an instruction that the state must make out its case to a moral certainty, and until it does so, the accused is not required to do anything, and thereafter he need only raise a reasonable doubt of his innocence to entitle him to an acquittal, should have been given.

4. HOMICIDE. *Burden of proof. Self defense.*

It is not true that, if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proven the excuse and justification and an instruction announcing this law should not have been refused defendant.

5. CRIMINAL LAW. *Opinion evidence. Conclusion.*

In a trial for murder a witness should not have been permitted to express his opinion that it "looked like there had been a crap game there," he should have stated the facts and let the jury draw their own conclusions.

6. CRIMINAL LAW. *Evidence. Hearsay.*

In a trial for murder the testimony of a witness, showing that the place of the killing had been pointed out to him by some one but that he did not know of his own knowledge where the killing occurred, was hearsay and inadmissible where it was not shown that he was correctly informed.

7. CRIMINAL LAW. *Trial. Rebuttal.*

In a trial for murder where a witness testified to a statement made to him by another witness in a doctor's office when the doctor was not present, it was not permissible to allow the doctor to testify what the other witnesses told him about the killing since such testimony was not in rebuttal.

8. CRIMINAL LAW. *Opinion evidence. Conclusion.*

It was error in a murder trial to permit testimony that a witness "reckoned that another witness had a son implicated in the killing; that is what they say" since this was purely hearsay testimony.

APPEAL from the circuit court of Neshoba county.

HON. C. L. DOBBS, Judge.

E. L. Cumberland was convicted of murder and appealed.

The facts are fully stated in the opinion of the court.

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Brief for appellant.

G. E. Wilson, for appellant.

Instruction number 7 to the jury is as follows, to-wit: "The court charges the jury for the state, that if the jury believes from the evidence beyond a reasonable doubt that Cumberland, with a pistol, shot Lidell, and thereby killing him, then the use of a deadly weapon is *prima-facie* evidence of malice and an intent to murder, and before this presumption is ever overcome it must be shown by the evidence in the case to the satisfaction of the jury, that at the time of such shooting with said deadly weapon, the defendant was in immediate, real or apparent danger of losing his life or suffering great bodily harm from Lidell, and such danger must have been urgent, present and imminent at the moment of the killing." The instruction violates one of the most sacred rights of defendant and absolutely deprives him of same in the consideration of this cause, by placing upon him the burden of proving his innocence. It is not the law, and never has been the law of Mississippi as we understand it, that the burden of proof in a criminal case, especially one of the magnitude of the case at bar, shifts to the defendant. In the instruction complained of the state requires the defendant to show by the evidence in the case to the satisfaction of the jury that he was in immediate danger of losing his life. The same instruction is perhaps more serious and more objectionable for the reason that it tells the jury that the danger under which appellant was placed at the time he took the life of deceased must have been urgent, present and imminent at the moment of the killing, absolutely excluding the well-established rule, and depriving the defendant of that benefit, which gave him the right to act when his danger is actual or apparent. This court has universally held to the rule, so far as we are able to ascertain, that when the danger to which defendant is subject is either real or apparent to a reasonable man under the circumstances presented to him, then he is under the law entitled to pro-

tect himself against an attack. It has never been the law that the defendant must be in actual danger, but if the danger only be reasonably apparent, then he is justified in acting; and yet the instruction complained of tells the jury not only that he must be in actual danger but that it must be urgent, present, and imminent at the very moment of the killing. *Blalock v. State*, 79 Miss. 520; *Ellis v. State*, 66 Miss. 44; *Haley v. State*, 63 So. 670; *Boykin v. State*, 86 Miss. 481; *Ford v. State*, 73 Miss. 734, 19 So. 665; *Herman v. State*, 75 Miss. 340; *Brandon v. State*, 75 Miss. 905, 23 So. 517; *Raines v. State*, 81 Miss. 489, 33 So. 19; *Riley v. State*, 68 So. 250.

Instruction number 8 given for the state is as follows, to wit: "The court charges the jury for the state, that if the jury believe from the evidence beyond a reasonable doubt that Cumberland shot and killed Lidell as charged in the indictment at the place of the supposed crap game, then under the law it is your sworn duty to find the defendant guilty of murder." This instruction is equally erroneous, and contains two fatal defects, and which under the law as announced by this court are sufficient to reverse the case. In the first place, the jury is instructed to convict the defendant if they believe beyond a reasonable doubt that he killed Lidell as charged in the indictment. This instruction is calculated to mislead the jury composed of men unlearned in the law and to call their attention from the other instructions in the case. It eliminates any idea whatever of self-defense, since the condition might arise where malice existed and yet when the homicide occurred, the defendant was acting in self-defense. We submit that this instruction is misleading, unfair, and highly prejudicial to the rights of defendant, and especially should be refused in a case where the issue at stake is so grave as the one at bar. Again it has been condemned by our court, universally, for assuming a fact which is untrue, or at least in controversy. The jury is told that if the killing occurred at the place of the supposed crap game, that it is its sworn duty to

find the defendant guilty. As has been shown in the discussion of the evidence in this case, there is no evidence of a crap game discovered on the day of the homicide, and not until a later day, all of which we have contended and still contend was inadmissible. As stated in the outset, the admission of this testimony was prejudicial; and it is now manifest to the court the purpose of injecting the crap game into the trial of this cause all through the taking of the testimony was to prejudice the minds of the jury; and in the instruction this purpose is manifest. Our courts have said that even where a question of fact is in controversy that it is error, and fatal error, for the court to instruct the jury in reference thereto. The learned district attorney manifestly injected this clause into the instruction for the purpose of enabling him to make a more effective and prejudicial argument to the jury. The logical effect this instruction would have had on any juror would have been that he considered it as an instruction or finding by the court itself that a crap game really did exist and was played by defendant and the deceased. *Oliver v. State*, 39 Miss. 523; *Fore v. State*, 75 Miss. 727; *Cooper v. State*, 31 So. 580.

In addition to Instructions numbered 7 and 8, given for the state, instruction 4, which is in the following language: "The court charges the jury for the state that murder is the killing of a human being with malice aforethought, and if the jury believe from the evidence, beyond all reasonable doubt, that Cumberland shot and killed Lidell and that the killing was done with malice aforethought, then he is guilty of murder and the jury should so find," is also fatally defective, in that it absolutely deprives the defendant of the right of self-defense. This instruction simply states an abstract proposition of law, when the proof in the case, both for the state and the defense, if the witness Jones' testimony is to be credited, shows that it was a controversy between the defendant and the deceased.

Brief for appellee.

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According to the contention of the defense, a full and complete case of self-defense was made, and yet the court by this instruction absolutely eliminated from the consideration of the jury the entire evidence of the defendant and his witnesses. Under no authority of law is the said instruction warranted, but is in conflict with every decision that we have been able to find rendered by this court.

For the fatal error in the instruction complained of for the state, we most earnestly insist that this case should be reversed.

Instruction number 12, as asked by the defendant and refused by the court, should have been given.

W. C. Easterling, for appellee.

Instruction number seven correctly announces the law. The instruction does not tell the jury that the burden of proof shifts. True it is that the burden of proof never shifts to the defendant. Under the law of this commonwealth an unexplained killing is murder. It has always been the law that malice is presumed from the deliberate use of a deadly weapon, and when the state proves the killing with a deadly weapon, the law presumes malice requisite to murder and the burden of procedure shifts. The instruction simply informs the jury that the law presumed malice from the use of a deadly weapon, unless the jury had a reasonable doubt from the evidence, that is, the whole evidence of the case, as to whether or not the defendant's life was in real or apparent danger at the hands of the deceased at the time of the killing. This instruction was given in *Guice's case*, 60 Miss. 714, by Judge Christman.

Instruction number six for the defendant told the jury that the presumption of innocence stood by the defendant throughout the trial, testifying as a witness as to his innocence and that it so remained until the moment the jury wrote their verdict.

Instruction number eight correctly announces the law. The instruction is as broad as the indictment. It informed the jury that if the defendant shot and killed Liddell at the place of the supposed crap game, as charged in the indictment, that he was guilty of murder. Surely he was guilty of murder if he "willfully, feloniously and of his malice aforethought" shot and killed Liddell at the place of the crap game.

Appellant had as liberal a set of instructions as any court could conscientiously give and, taking the instructions as a whole, appellant has no just cause to complain.

George H. Etheridge, assistant attorney-general, for the state.

Criticism of instruction number 7 for the state is without merit, because where a killing occurs with a deadly weapon, the presumption arises that the killing was malicious and wrongful and it must appear from the evidence that all the facts of the killing had been disclosed before this presumption is dispensed with, and in order to justify any theory of the rightful use of the weapon the facts must show that there was urgent, present and imminent danger of death or great bodily harm to justify the use of such weapon. If the instruction be conceded to be stating the law too strongly, still it is amply modified and explained in the other instructions, and taking all the instructions together and considering them as an entirety, it is perfectly manifest that the defendant was not prejudiced by the statement of law and the charges, and that he had all the rights accorded him by law stated in the instructions taken as a whole. It does not shift the burden of proof because the burden of proof is fully met by proving a killing with a deadly weapon. To overturn a case made with such proof is fully met by proving a killing with a deadly weapon. To overturn a case made with such proof it must appear from the facts proven that the

killing was justifiable or excusable or that there was an appearance of things leading a reasoning mind to that conclusion. The law of apparent danger and the right of appellant to act thereon is fully given in the instructions taken as a whole.

The criticism of instruction number 8 for the state is without merit because it is clear that if the defendant had unlawfully, wilfully, feloniously, of his malice aforethought, killed and murdered Lidell, at the place of the supposed crap game that he would be guilty of murder, and that is what appears in the indictment in the record on page five thereof and that is exactly what the instruction meant when it was first charged in the indictment. This instruction does not tell the jury to convict him if they believe he was shot at the crap game or at the ground known as the crap ground in the record, it does not eliminate self-defense, because if a person shoots unlawfully and willfully and with malice aforethought he cannot shoot in self-defense. The word "unlawful" clearly means such a killing is not self-defense because a killing in self-defense is lawful. The instruction does not assume that the killing had taken place at the supposed crap game but states that if it had occurred there and if it was of the character described in the indictment it would constitute murder.

There is no merit in the criticism of instruction number 4 for the state because malice aforethought is a term used in law to distinguish murder from every other kind of killing, and if the appellant wanted a definition of malice aforethought, it was his duty to ask for it. The term is generally, if not universally understood where English Jurisprudence prevails.

There is no merit in the contention of appellant that the court erred in refusing instructions because the law was fully, clearly, and distinctly given in the charges which were marked "given" by the court.

SYKES, J., delivered the opinion of the court.

The defendant, E. L. Cumberland, in February, 1913, in Neshoba county, shot with a pistol and killed one Will Lidell. He was convicted of murder and prosecutes this appeal.

The testimony for the state was sufficient to sustain the verdict of the jury, and that of the defendant made out a case of self-defense. Eyewitnesses to the homicide were introduced by both the state and defendant. The court gave the state the following instruction (No. 7):

"The court charges the jury for the state that if the jury believes from the evidence beyond a reasonable doubt that Cumberland with a pistol shot Lidell, and thereby killing him, then the use of a deadly weapon is *prima-facie evidence* of malice and an intent to murder, and before this presumption is overcome it must be shown by the evidence in the case, to the satisfaction of the jury, that at the time of such shooting with said deadly weapon the defendant was in immediate, real, or apparent danger of losing his life or suffering great bodily harm from Lidell, and such danger must have been urgent, present, and imminent at the moment of the killing."

This instruction is erroneous, and in effect shifts the burden of proof to the defendant to satisfy the jury by the evidence of his innocence when the killing with a deadly weapon has been proven. True, it states that the jury ought to be satisfied from the whole evidence of his innocence; but we see no difference between this instruction and those which directly state that this burden rests upon the defendant. It further omits the fact that the jury must acquit the defendant if they have a reasonable doubt, arising from the evidence or the lack of evidence, of his guilt. This same instruction was given to the state in the *Guice Case*, 60 Miss. 714, and was also given in the *Lamar Case*, 63 Miss. 265. The court, in discussing this instruction in the *Lamar Case*, in part says:

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“By the second instruction which was given for the state, the district attorney invoked, in behalf of the state, the presumption of malice, which arises from the killing with a deadly weapon, and by it the jury were told that this presumption must control unless from the evidence it appeared, to their satisfaction, that there were circumstances of alleviation, excuse, or justification.

“The very common practice by prosecuting attorneys of emphasizing the presumption of malice which arises from the use of a deadly weapon, and of isolating and separating this presumption from all the other evidence in cases in which all the facts and surrounding circumstances are known and detailed by witnesses, should be discouraged by the trial judges by inserting in such instructions, when asked, the explanation that, though such presumption exists, yet when the facts and circumstances of the homicide are detailed by the witnesses, the jury should consider all the evidence, and from a consideration of the whole case determine whether the killing was or was not malicious. It is true that the law presumes malice from the deliberate use of a deadly weapon; it is not true that this presumption should control in determining the verdict in cases in which all presumptions are swallowed up by a full disclosure of all the facts surrounding and attending the killing. Instructions of this character are not erroneous, for the presumption does exist as stated, but it exists as a part of the whole case and not as a dominating factor controlling all the facts disclosed, as it is the tendency of such instructions to suggest. But the instruction in this case goes further, and informs the jury that this presumption of malice is to prevail unless, from the evidence, circumstances of alleviation, excuse, or justification are shown to the satisfaction of the jury. . . .

“It is sufficient if the evidence taken as a whole, whether introduced by the state or by the defendant, leaves the question of his guilt in reasonable doubt.

"The case of *Guice v. State*, 60 Miss. 714, in which an instruction of similar character was held not to be erroneous, was one in which this court was able to say that no evidence was introduced either by the state or the defendant proving, or tending to prove, an overt act by the deceased."

The defendant was denied an instruction fairly stating the converse of the above, reading as follows:

"The court instructs the jury for the defendant that in this case the state must make out her case to a moral certainty, and it is not until she has done so that the accused is required to do anything, and then he need only from the whole body of the evidence adduced for him and against him raise a reasonable doubt of his guilt to entitle him to acquittal; and it is not true that, if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder, unless he has by his evidence proven the excuse or justification."

The above instruction is a correct announcement of the law and should have been given.

There were errors also in permitting the introduction of certain testimony:

The witness McElroy should not have been allowed to express his opinion that it "looked like there had been a crap game there;" he should have stated the facts and let the jury draw the conclusion therefrom. The testimony of A. J. Yates showed that the place of killing was pointed out to him by some one, but by whom he did not say. He did not know, of his own knowledge, where the killing occurred; and it was not shown that he was correctly informed as to this, consequently his entire testimony was hearsay and should have been excluded. The testimony of Dr. Watkins about the witness Jones making a statement to him about the facts of the killing was evidently introduced in rebuttal of the testimony of the witness Bryan. The latter had testified of a statement made to him by Jones in the office of Dr. Watkins. Bryan stated, however, that Dr. Watkins was not present at

this conversation; and in this he was not contradicted by Dr. Watkins. Therefore the testimony of Dr. Watkins was not in rebuttal and should have been excluded. It was further error to allow the witness Wilborn to testify that "he reckoned" the witness Cox had a son implicated in this killing, "that is what they say." This is another instance of hearsay testimony purely and simply.

Reversed and remanded.

HALLOWAY v. MILES ET AL.

[70 South. 697.]

1. EVIDENCE. *Secondary evidence. Public lands. Title. Prima facie title.*

Under Code 1906, sections 1960-1961, providing for the admission of copies of records of the United States offices in evidences where plaintiff claimed land under a certificate of entry from the United States, claiming it a part of the public domains, the tract book of original entries, showing that the property had been reserved as school lands and accepted by the state was admissible to establish this fact.

2. PUBLIC LANDS. *Title. Prima facie title.*

Code 1906, section 1959, declaring that all certificates issued in pursuance of any act of Congress shall vest full legal title in the person to whom the certificate is granted, and shall be received in evidence, saving the paramount right of other persons, merely announces a rule of evidence and establishes only a *prima facie* title, which may be overcome and defeated by a superior or paramount title, and when a certificate of entry was issued by the United States land office to land which had been reserved as school land and accepted by the state, the entryman acquired no title, since the United States had none.

APPEAL from the circuit court of Wilkerson county.

HON. E. E. MOON, Judge.

Suit by A. C. Halloway against W. P. Miles and others.
From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

D. C. Bramlett and F. W. Tucker, for appellant.

The case of *Carruth v. Gillespie*, cited by opposing counsel, is not in point here, for in that contest there was no question as to whether or not the United States had parted with its title. In the case at bar the presumption of title in appellee by adverse possession is overthrown by the fact that the United States had never parted with title until the grant by certificate of entry to appellant. Be that as it may, our state courts are not the tribunal to determine the right of appellee, if any, but the United States tribunals are the proper ones for appellee to apply for aid.

Ackland H. Jones, for the appellees.

Since the original brief was filed herein, this court has handed down its decision in the case of *Caruth v. Gillespie*, No. 16, 651, 68 So. 927. That case, and the authorities cited therein, is conclusive on the question of the presumption invoked by appellees in this case. I desire, in this brief, to add the above case to those cited in my original brief.

HOLDEN, J., delivered the opinion of the court.

The plaintiff in the court below relied upon his certificate of entry issued by the United States land office at Jackson, Mississippi, showing an entry upon the land in question by appellant. At the trial in the court below, appellant introduced this certificate and the tract book of original entries and rested his case, relying upon section 1959, Code of 1906, which reads as follows:

“All certificates issued in pursuance of any act of Congress by any board of commissioners, register of any land office, or any other person authorized to issue such certificate, founded on any warrant, order of survey, entry, grant, confirmation, donation, pre-emption, or purchase from the United States of any land in this state, shall vest the full legal title to such land in the person to whom such certificate is granted, his heirs or assigns, so far as to enable the holder thereof to maintain an action thereon, and the same shall be received in evidence as such, saving the paramount rights of other persons.”

The defendant in the court below, and appellee here, introduced his evidence showing that the land here involved was school land, designated and reserved as such by the United States government, and accepted and so used and considered by the proper authorities in Wilkinson county as school land for about seventy years, and now leased by appellee.

This appears to be true from the tract book of original entries showing the entries made of the public domain; this tract book being competent evidence under sections 1960 and 1961, Code of 1906. At the time the plaintiff obtained his certificate from the United States land office, upon which he bases his title, there was no title in the United States government to said land; consequently, plaintiff obtained no title except as given him by the certificate under the said section 1959, Code of 1906. But from a careful reading it is plain that this section 1959 of Code of 1906 merely announces a rule of evidence, and establishes only a *prima-facie* title, which may be overcome and defeated by a superior or paramount title. This conclusion is not out of line with the case of *M. E. Camp Ground Association v. Brown*, 105 Miss. 313, 62 So. 276, and is in accord with *Jones v. Madison County*, 72 Miss. 777, 18 So. 87.

Affirmed.

MILLER v. GRIFFIN.

[70 South. 699.]

REPLEVIN. Verdict. Form. Restoration of property. Statutes.

Under Code 1906, section 4233, which provides that the judgment for plaintiff in replevin, where defendant gives bond, shall be for the restoration of the property, with damages, a judgment against defendant and the sureties on his bond for damages only is erroneous.

APPEAL from the circuit court of Forest county.

HON. PAUL B. JOHNSON, Judge.

Replevin by J. L. Griffin against John Miller. From a judgment for plaintiff, defendant appealed.

Appellee filed suit in replevin to recover of appellant certain sawmill machinery, described in the declaration as being in possession of and wrongfully detained by appellant. On the trial the jury returned the following verdict:

“We the jury for plaintiff and assess the damages at three hundred and eighty-five dollars as shown by an itemized account as assessed.”

Judgment was accordingly entered:

“It is therefore ordered and adjudged by the court that J. L. Griffin, plaintiff, do have and obtain judgment against John Miller, the defendant, for three hundred and eighty-five dollars as shown by an itemized account as assessed. also against T. W. Cox, bondsman of the defendant John Miller, for three hundred and eighty-five dollars.

Section 4233 of the Code is as follows:

4233 (3726) *Judgment for Plaintiff*.—If the plaintiff recover, and the defendant has given bond for the property, the judgment shall be against the defendant and the sureties on his bond, that they restore the property to the plaintiff, if to be had, or pay him the value thereof, or

of his interest therein, if a limited one, as assessed by the verdict of the jury, and that they pay to the plaintiff such damages as shall have been assessed by the jury for the wrongful taking and detention, or for the wrongful detention thereof; but if the plaintiff has given bond for the property, the judgment shall be that he retain it, and that he recover of the defendant the damages assessed for the wrongful taking and detention, or wrongful detention, as the case may be. If the plaintiff recover judgment by default, he may have a writ of inquiry to assess the value of the property or the damages for the wrongful taking and detention, or wrongful detention, or both, as the case may be; and judgment shall be rendered therein as upon an issue found for him."

Flowers & Broun, for appellant.

The judgment is erroneous as it merely amounts to a judgment in damages and does not provide for the disposition of the property.

"If the plaintiff recover, and the defendant has given bond for the property, the judgment shall be against the defendant and the sureties on his bond, that they restore the property to the plaintiff, if to be had, or pay him the value thereof . . ." Section 4233, Code.

The judgment in this record says nothing about the property at all. In the shuffle it seems to have been lost. Appellee at the time he first complained about his junk said he wanted nothing but his machinery. When he entered his judgment he seems to have forgotten about his machinery and thought only of the damages of three hundred and eighty-five dollars. The most lenient and charitable view that can be taken of this case is that the jury intended by their verdict to direct that the property be returned to plaintiff or in case of failure to do so, the defendant pay over to him the amount assessed by them to wit: three hundred and eighty-five dollars. The verdict of the jury is "We the jury find for the plaintiff,

and assess the damages at three hundred and eighty-five dollars as shown by an itemized account assessed."

In replevin here the defendant has given bond for the property, if the plaintiff recover, the judgment must be against the defendant and the sureties on his bond, and must be that they restore the property to the plaintiff, if to be had, or pay him the value thereof and if the jury fail to assess the value of the property no judgment can be entered on their verdict. *Drane v. Hilzheim*, 13 S. & M. 336; *Bedon v. Alexander*, 47 Miss. 254; *Spratley v. Kitchens*, 55 Miss. 578; *Clarke v. Parker*, 63 Miss. 549; *Atkinson v. Foxworth*, 53 Miss. 733; *Whitaker v. Godwin*, 53 So. (Miss.) 413.

The verdict of the jury in the case at bar assessed nothing but the damages, or what appears to be damages—and the plaintiff's judgment sounds in damages only. No alternative was allowed defendant to return the property or pay the value thereof. In fact no value at all was assessed by the jury. They do not appear to have considered the value of the property at all.

"In replevin, if the jury find for the plaintiff, it must assess the value of such goods as well as the amount due plaintiff and a failure to do this will necessitate a reversal of the judgment." *Bedon v. Alexander*, *supra*.

The verdict is silent as to the value. It will not support a judgment and for this and the other reasons stated we respectfully ask that this case be reversed.

E. A. Anderson and Watkins & Watkins, for appellee.

(4) It is contended by the appellant that the judgment in this case should be reversed because the final judgment was for three hundred and eighty-five dollars, and not in the form provided by the statute; that is to say, that the law requires that in the event the plaintiff shall recover, he shall first recover the property, with the items separately valued, and in default of the property's being restored to him, he shall recover the value thereof.

We wish to call the attention of the court to the fact that while on the verdict to which we previously directed the attention of the court, a money judgment was rendered against the appellant and the surety on his bond, no point whatsoever was made thereon in the lower court. The appellant filed a motion for a new trial, which is elaborate and specific; but in the motion for new trial, absolutely no reference is made to the fact that a money judgment was entered against the appellant, and no exception of any kind or character was taken by the appellant in the court below thereto.

The court will notice that this suit was filed in February of the year 1912, and not tried until June, 1913, and for some time prior to the filing of this suit, the appellant was in possession of the personal property, using the same, and it is very likely that the actual property was probably consumed and used, and both appellee's counsel and appellant's counsel knew that the appellant could not return the identical articles; and, therefore, in the court below, no importance was attached to the fact that a money judgment, instead of the statutory judgment in the alternative was rendered. We repeat in this connection what we have already said in reference to objections in the court below.

Subdivision number 3 of Rule number 6 is in the following language: "The right of an appellant to obtain a review in this court of any ruling made in the trial court shall not depend in any wise upon his having filed in such court a motion for a new trial, or if such motion has been filed upon the grounds thereof being distinctly specified."

We reaffirm the position which we have previously taken in this brief, that that rule did not in any manner render it unnecessary or less imperative that the appellant should reserve some kind of exception in the court below. In other words, from this record, the judgment which was entered was entered without objection or exception of any kind. We therefore respectfully sub-

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Brief for appellee.

mit that the appellant cannot complain of the form of the judgment. Both parties probably concluded that a judgment requiring the appellant to restore the property would have been a useless and idle provision, proceeding doubtless upon the theory that the constant use of the property by the appellant had rendered it by that time valueless, which we have no doubt in the world was a fact at the time of the trial of this clause in the court below. The record is highly suggestive of this theory.

Be this as it may, however, the error complained of in this respect, if any error at all, is one which is easily corrected by this court without any kind of reversal. In other words, if the verdict of the jury was sufficiently sustained by the evidence, and if there is no other reversible error in the record, as a matter of right, this court should merely enter up the kind of judgment which the court below should have entered in the premises, without a reversal of the case, and even without taxing the appellee with the cost of the appeal.

A similar question was presented in this court in the case of *Ice Company v. Adams*, 75 Miss. 410. In that case, on an appeal from an assessment by a municipal board of *ad valorem* taxes to the circuit court, on the affirmance of the assessment, the circuit court rendered a personal judgment against the delinquent tax-payer for the amount of taxes. On appeal to this court, it was held that the form of the judgment was erroneous, that the only judgment which should have been entered was a judgment affirming the assessment of the municipal board. The court, however, held that the judgment was subject to correction, and entered up the proper judgment which should have been entered, declining to tax the appellee even with the costs of the court, using the following language:

“A judgment *in personam* for six hundred and thirty dollars should not have been rendered. The judgment was unnecessary; for the assessor, armed with his approved assessment roll, had all the authority required

to proceed in the usual manner to collect the taxes. The judgment of the circuit court affirming the additional assessment was correct, and that action of the lower court is hereby affirmed. The judgment *in personam* is vacated and set aside, and inasmuch as the appellant will take nothing substantial because of our setting aside the personal judgment, and because the real question litigated is determined against it, that is to say, because its liability to assessment and taxation is herein declared, the appellant will be taxed with all costs."

So, in this case, if the court finds that there is no other error in the record which would justify a reversal of the case, then the real questions litigated have been determined against the appellant, a mere correction in the form of the judgment is of no such benefit or advantage to the appellant as would entitle it to have the appellee taxed with the cost in the case. We respectfully submit, however, that appellant should have made this point in the court below, where the form of the judgment could have been corrected upon the slightest suggestion from appellant's counsel, and not having done so, it should be conclusively presumed that on this appeal the appellant, for reasons above stated, acquiesced in the form of the judgment.

HOLDEN, J., delivered the opinion of the court.

The record in this case shows that the judgment of the court below is erroneous, in that it does not comply with section 4233, Code 1906. The damages assessed are excessive.

Reversed and remanded

BEST v. PITTS ET AL.

[70 South. 700.]

COURTS. *Jurisdiction. Amount in controversy. Interest. Payment.*

Under Code 1906, section 2681, so providing, payment made will be applied to accrued interest first in the absence of any agreement to the contrary, and the circuit court has jurisdiction of a suit upon a note for two hundred and thirty dollars when the accrued interest at the time of a payment of fifty dollars amounts to more than that amount.

APPEAL from the circuit court of Jones county.

HON. PAUL B. JOHNSON, Judge.

Suit on a promissory note by Mrs. Julia Best against W. H. Pitts. From a judgment dismissing the cause, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Robert L. Bullard, for appellant.

This was a suit begun in the circuit court on a promissory note dated November 4, 1908, for two hundred and thirty dollars, bearing interest at ten per cent from date.

On May 26, 1911, the sum of fifty dollars was paid on the note which was indorsed on the back of it as of that date. A motion was made by the defendant to dismiss the suit because of an alleged want of jurisdiction of the amount involved which was sustained, the cause dismissed, and this action of the court is assigned for error.

It will be observed from a simple calculation that at the time this fifty dollars was paid the amount due on the note, principal and interest, was a little more than two hundred and eighty-seven dollars and fifty cents, which, after deducting the payment, left two hundred and thirty-seven dollars and fifty cents due and nothing has since been paid. The suit was begun August 26, 1913.

The appellant contends that this payment of fifty dollars ought to be deducted from the face of the note, notwithstanding more than fifty-seven dollars and fifty cents of accrued interest was then due.

I do not think that this merits discussion or citation of authority, and so I submit it.

Hardy & Arnold, for appellee.

Our contention is that the principal amount involved in this suit was one hundred and eighty dollars, and if this is true, then the circuit court had no jurisdiction.

The principal amount involved was one hundred and eighty dollars because to figure any other amount as the principal amount would be to take into consideration interest *and this* cannot be done to determine jurisdiction. Jurisdiction of the justice court is fixed by section 171 of the Code of 1890. Interest must be excluded in computing the amount in controversy. *Jackson v. Whitfield*, 51 Miss. 202; *N. O. G. N. R. R. Co. v. Evans*, 49 Miss. 785.

To hold that the circuit court had jurisdiction of the matter here involved would be to make jurisdiction depend on interest; would be a shifting question—and this is never permitted.

We contend that the proper court to have tried this cause was the justice court and that the circuit court was right in sustaining the motion to dismiss for want of jurisdiction.

We respectfully submit the case should be by this court affirmed because there was no error.

STEVENS, J., delivered the opinion of the court.

Appellant, as plaintiff in the court below, instituted this action of debt in the circuit court of Jones county on a promissory note executed by appellees in appellant's favor November 4, 1908, in the sum of two hundred and thirty dollars. The defendants moved to dismiss the suit because the declaration showed the court was

without jurisdiction, appellees claiming the amount in controversy to be within the jurisdiction of the justice of the peace and below the jurisdiction of the circuit court. This motion was by the court sustained, and from the judgment dismissing the cause, appellant prosecutes this appeal.

The note in question bears interest from date, to wit, November 4, 1908, at ten per cent. per annum, and reflects a credit of fifty dollars entered on the back of the note as of date May 26, 1911. The suit was instituted August 26, 1913. A simple calculation shows that at the time the fifty dollars was paid and credited there was due an amount of interest in excess of the fifty dollars so paid. The record of course, reflects no agreement between the parties as to the application of the payment, and under our statute (section 2681, Code 1906) the accrued interest at the time of the payment shall be first paid. After crediting the payment to the accrued interest, the principal of the note is left intact, and, in fact, all of the accrued interest was not paid. At the time the suit was instituted appellees owed the full amount of the principal and a material amount of past-due interest, and the court manifestly had jurisdiction of the suit.

Reversed and remanded.

CLARK ET AL. v. FOSTER ET AL.

[70 South. 583.]

1. REMAINDER. Action. Limitations. Running of statute. Remaindermen. Infants. Property. Sale. Power of court. Limitations of actions.

Where land was devised by a testator in trust to his daughter for life with remainder to his minor grand-children and such land

was wrongfully sold during the minority of the remaindermen and while the life tenant was living, the statute of limitations did not run against the remaindermen before the termination of the life estate, as their right to possession did not accrue until the death of the life tenant. In such case the remaindermen may have the deed cancelled, and upon becoming entitled to possession, may recover the land, although it was sold under an erroneous order of the court; Code 1906, section 3122, fixing a two year period under which land sold by order of court may be recovered, having no application.

2. *INFANT. Property. Sale. Power of court.*

The chancery court has no inherent power to decree a sale of an infant's real estate for reinvestment. This can only be done in the way now provided by statute, to wit: a judicial sale by the regular guardian of the infant.

3. *LIMITATION OF ACTIONS. Running of statutes. Remainderman.*

Where land was devised in trust to one for life, with remainder to another and was wrongfully sold, the fact that the trustee's rights were barred by limitation will not bar the remaindermen from securing cancellation of the deed, under Code 1906, section 3123 (Code 1892, section 2761), providing that the running of the statute of limitations against the trustee shall bar the beneficiary, where the life tenant is still alive, for until her death the remaindermen have no right to possession, and the trustee's failure to sue could not bar them.

APPEAL from the chancery court of Calhoun county.

HON. D. M. KIMBOROUGH, Chancellor.

Bill by Lewis Foster and others against W. H. Clark and others. From a decree for complainants, defendants appeal.

The facts are fully stated in the opinion of the court.

Haman & Bates and Flowers, Brown, Chambers & Cooper, for appellants.

J. E. Harrington, for appellees.

STEVENS, J., delivered the opinion of the court.

Appellees, as complainants in the court below, presented their bill in equity to cancel certain deeds of convey-

110 Miss.]

Opinion of the court.

ance to one hundred and sixty acres of land in Calhoun county, claimed by and in the possession of appellants, the defendants in the court below. The lands originally belonged to one Simon Myers, who died testate, and who, by the terms of his will, directed an equal division of his estate among his several children. The will directed, however, that the interest of his married daughter, Alice Foster, should not be turned over to, managed, or controlled by, his said daughter or her husband, H. P. Foster, but that her portion of the estate, under the terms of the will, was to be managed and controlled by Greenwood Ligon, a son-in-law of the testator, with direction that said trustee apply the trust property to the use and benefit of Alice Foster so long as she should live and, after her death, to the use and benefit of all her children in equal amount and proportion. The provisions of the will in this regard are as follows:

"I do hereby appoint and constitute my son-in-law, Greenwood Ligon, executor of my last will and testament, trustee of my said daughter, Alice Foster, during her natural life, and for her children after her death, to whom as such trustee, the whole of the said property and estate, real, personal and mixed herein intended to be appropriated and applied to the use and benefit of my said daughter, Alice Foster, and her children after her death, is hereby and herein bequeathed in trust for the benefit of my said daughter, Alice Foster, and her children as aforesaid, and it is my will and intention and I hereby direct that the said Greenwood Ligon shall have and exercise full and complete control of the whole of said trust estate, and shall direct, control, appropriate, and apply the said trust property and estate to the use and benefit of my said daughter, Alice Foster, as long as she shall live, and after her death in like manner to the use and benefit of all of her children, born of her body, in equal amount and proportion, it being my intention, will and desire hereby to vest in said trustee, the legal and

110 Miss.—35

equitable title to all of said property and estate for the purpose of fulfilling said trust."

Greenwood Ligon was also appointed executor, and accepted the trust reposed in him, executed the will under the directions of the court, presented his final account, and was discharged as executor. He also, accepted the trust committed to him as trustee for and on behalf of Alice Foster and her children for a considerable length of time. Thereafter a petition was filed in the chancery court of Chickasaw county, where the will was probated and the estate administered upon, asking the court to remove Greenwood Ligon as trustee and to turn over the trust property to Alice Foster and her husband. Greenwood Ligon thereupon resigned his office of trustee. The court accepted his resignation, and turned over the trust property to Alice Foster as prayed for. The supreme court on appeal reversed the decree of the chancellor, and directed the lower court to appoint another trustee in the place and stead of Greenwood Ligon, and to have the trust further administered by a trustee appointed by the court. The Chancery court then appointed George S. Foster trustee, who qualified and served as such until his death in 1896. See reported case of *Ligon v. Foster*, 63 Miss. 241. It appears that the lands here in controversy were, by partition proceedings, set aside and allotted to Alice Foster and her children as a portion of the estate of Simon Myers, deceased, and in 1887, on petition of Alice Foster and her husband, Pope Foster, the chancery court undertook to authorize and empower George S. Foster, trustee, to sell these lands, either at public or private sale, for the purpose of reinvesting the proceeds "in other and more productive lands." It appears from this decree, dated May 25, 1887, that H. B. Lacy acted as guardian *ad litem* of the children of Pope and Alice Foster. In pursuance of this decree George S. Foster, trustee, undertook, on September 4, 1888, to convey the land in controversy by private sale to one J. T. Bennett. The deed recites a cash consideration of

two hundred dollars, but the proof shows that the only consideration received was an old wagon and some live stock, which was turned over to Alice Foster and her husband and used by them on their little farm. The sale by the trustee was never reported to, nor confirmed by the court, and of course no proceeds of the sale were ever reinvested in other or more productive lands. The children of Alice Foster received no benefit from this sale whatever. On April 4, 1898, the purchaser, Bennett, who had taken possession of the land, sold and conveyed eighty acres to W. H. Clark, and to his wife, L. F. Clark, the remaining eighty acres. W. H. and L. F. Clark were the defendants in the court below and appellants here. D. C. Cooner, the other appellant, holds a deed of trust, executed by the Clarks, on the land in question. The bill in this case was filed September 3, 1912, about twenty-four years after the entry of Bennett; but at the time of the filing of this bill Alice Foster, the life tenant was still living. The defendants, by their answer, invoked the several statutes of limitation; that is, the ten-year statute of limitation conferring title by adverse possession. Section 3123, Code of 1906 (section 2761, Code of 1892); section 3122, Code of 1906 (section 2760, Code of 1892); and sections 3090, 3091, Code of 1906 (sections 2730, 2731, Code of 1892). The chancellor granted the relief prayed for, and cancelled the deed of conveyance from George S. Foster, trustee, to Bennett, and the deed from Bennett to appellants, as a cloud upon the remainder of appellees; and from this decree appellants prosecute this appeal.

The complainants sue as children of Alice Foster, and were infants at the time the court undertook to empower George S. Foster, trustee, to convey the entire fee. At the time of the filing of this suit they had not come into the possession of their estate; the life tenant or beneficiary being alive. It is practically conceded by counsel for appellants that the deed from George S. Foster, trustee, to Bennett did not convey a good title, but the contention is earnestly made that this deed furnished suffi-

cient color of title under which Bennett and his grantees, appellants here, entered into possession of the property in good faith, erected valuable improvements, and used the property fully and completely as their homestead. It is contended, therefore, that appellants have a good title to the entire fee by adverse possession. It is further contended that appellees are concluded by the several statutes of limitations mentioned. In our judgment none of the statutes of limitation can be pleaded against the appellees in this case. By the terms of the will of Simon Myers they are given the beneficial interest in the remainder after the termination of the life estate. The fact that the will provides for a trustee to manage and control the property does not alter the case. Whether the remainder is owned by appellees in fee or is held by trustee for their use and benefit, they cannot come into the use and enjoyment of their estate until the termination of the life interest.

"A *cestui que trust* will not be deprived of his right to relief by any length of acquiescence, unless he has an immediate possessory title to the beneficial interest. For instance, when a person was entitled to the trust of a beneficial lease in remainder, after the determination of a previous life estate, it was held that the statute did not begin to run until the death of the life tenant. Hill on Trustees, 266; *Bennet v. Colley*, 5 Sim. 181. 'The rights of the *cestui que trust* cannot be barred until his rights fall into possession. If, therefore, the *cestui que trust* holds in remainder or reversion, the statute will not begin to run until his right to the possession falls in by the determination of the particular estate.' 2 Perry on Trusts, sec. 860." *Groves v. Groves*, 57 Miss. 658.

That the two-year statute within which an action must be brought to recover property sold by order of the chancery court, now appearing as section 3122, Code of 1906, cannot be invoked in this case is settled by the case of *Jordan v. Bobbitt et al*, 91 Miss. 1, 45 So. 311. This statute does not begin to run until the death of the life tenant.

It will be remembered, in this connection, also, that George S. Foster, trustee, received no cash consideration, but simply undertook to barter the land for an old wagon and some stock. The proceeds were in no wise reinvested in other lands.

The decree of the court authorizing Foster, trustee, to sell the fee was clearly erroneous. *Hoskins v. Ames*, 78 Miss. 986, 29 So. 828. In this case the remaindermen in an action of ejectment were held not to be concluded by decree of the chancery court, appointing commissioners to sell the entire estate for the purpose of reinvesting the proceeds; and the court, by Terrell, J., observes in a positive and profound fashion that the chancery court has no inherent power to decree a sale of an infant's real estate for reinvestment. This can only be done in the way now provided by statute, to wit, a judicial sale by the regular guardian of the infant. The purported sale by the trustee to Mr. Bennett was never reported to nor confirmed by the court, and was in fact not a judicial sale at all. Under the very terms of the decree, directing the trustee to sell, Mr. Foster would have no right to barter the land for personal property. The whole proceeding amounted to a fraud on the rights of the infants, who received no benefit either before or after they became of age and who, therefore, could in no wise be now estopped by the void proceedings.

None of the ten-year statutes of limitation invoked could begin to run until after the termination of the life tenant. It is contended that the statute operated against George S. Foster, trustee, and that by the provisions of section 3123, Code of 1906, and the same statute in the Code of 1892, the beneficiaries are barred. It is a sufficient answer to say that appellees, as owners of the equitable estate after the death of Alice Foster, have not yet come into possession or enjoyment of their equity. Whatever their estate may be called, they cannot use it or have it appropriated to their use until the death of the life tenant. George S. Foster never, in fact, became

an active trustee of the property for their benefit. He could not manage, control, or handle the property for appellees until after he finished acting as trustee for Alice Foster. Aside from the fact that the trustee died within ten years from the date of execution of his deed, this statute cannot be invoked against appellees. In this case it in no event could begin to run until the death of Alice Foster. The question of whether Alice Foster is bound by the deed of her trustee does not present itself in this case. However binding the title of appellants may be on the life tenant, the rights of appellees are still in expectancy; *West v. Robertson*, 67 Miss. 213, 7 So. 224.

The right of appellees to maintain this suit at this time was not challenged by the pleadings, and is in no wise presented to us for decision.

Affirmed.

YAZOO & M. V. R. CO. v. MONROE.

[70 South. 689.]

MASTER AND SERVANT. *Contract. Compensation.*

Where under the contract of service either party could terminate it at pleasure, a servant who only worked seven days in a month before he was discharged, can only recover for such time as he worked and not for the whole month.

APPEAL from the circuit court of Adams county.

HON. E. E. BROWN, Judge.

Suit by Gale Monroe against the Yazoo & Mississippi Valley Railroad Company. From a judgment for plaintiff, defendant appeals.

Mayes & Mayes, for appellant.

We respectfully insist that appellant's motion to exclude the evidence and direct a verdict for it, should have been sustained. Plaintiff's case failed utterly, by reason of the fact that, according to his own statement of the terms of his contract, the employment was for an indefinite period, to endure solely at the will of the parties.

On pages 14 and 15 of the record, appellant attempted to prove the rule, which plaintiff admits, above, he knew of, and that it formed a part of his contract, but the court would not allow this to be done. This was plainly reversible error. 8 Am. & Ann. Cas., note, 281.

For the foregoing reasons, we respectfully insist that this case should be reversed, and that plaintiff below, appellee here, be awarded a judgment for fifteen dollars, and taxed with all costs of this suit (Sec. 771, Code of 1906); or, failing in this, that the case be reversed, and remanded for further trial.

M. W. Reily, for appellee.

Appellant contends that plaintiff's case failed by reason of the fact that by the terms of the contract the employment was for an indefinite period to endure solely at the will of the parties. Counsel attempts to substantiate this claim by the questions and answers appearing on page 11 of the Record.

It is impossible, after reading the full testimony of the appellee, for an unbiased mind to reach any other conclusion than that the appellee was employed to work by the month for the appellant at a stated salary, and that the appellant had the right to discharge the appellee at the end of any one month. It is true that when counsel for appellant asked appellee: "If he did not know at the time of his employment that the appellant employed its men at the will of the company as long as they could agree, and that the railroad company had the

right to dispense with the service of any man at any time" that the appellee answered "yes sir."

It is further true that when counsel for appellant asked appellee the following question: "You told me a while ago that when you took this employment you understood that the railroad company employed its men at their will subject to be discharged at any time. You did understand that?" that the appellee answered: "Yes sir; that part." However, the appellee testified that when employed, that the agent of appellant "informed me that I was to work by the month as check-clerk.

The substance of the answers of appellee to the questions of counsel for appellant amounts to the same, to wit: that he was employed by the month and that he never knew or understood that the railroad company would dismiss him without cause during the month, without paying him a month's salary. He did understand that for just cause he might have been discharged, or as he testified "If you are entitled to be fired."

The contention of appellant that this cause should be reversed because the court refused to allow the appellant to prove the rule of the appellant touching the employment of its servants, is of no weight because no rule of the company could affect the rights of appellee unless he knew of them and agreed to them at the time that he was employed, and the appellee testified positively that he understood that he was employed by the month that the company had no right to discharge him; otherwise that at the end of a month, except for just cause. If that was the contract which existed between the appellant and appellee, no amount of evidence proving a rule of the company would possibly affect the rights of appellee. The court will remember that the man who employed the appellee and made the contract with him did not testify upon the trial of this case and did not deny that the terms under which appellee was employed were just as the appellee contends that they were.

For the above reasons I respectfully submit that this case should be affirmed.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the circuit court of Adams county, where appellee recovered judgment for sixty dollars claimed to be due him as wages by appellant. The whole testimony in this case shows conclusively there was a contract of employment between appellant and appellee which might be terminated at any time at the will of either the employer or the employee. Appellee worked seven days for appellant during the month of January, 1913, for which he was entitled to recover; but under the contract of employment, and the rules and custom of appellant, which the appellee states that he knew at the time of employment, the appellee cannot recover wages for the full month of January, which he did not earn, but is entitled to the sum of fifteen dollars, which was tendered, the amount earned by him before he was dismissed from the service of appellant.

In view of these conclusions, this case is reversed, and judgment entered here for appellee for the sum of fifteen dollars, and taxing appellee with all costs in the court below and here.

Reversed.

BOSWELL BROS. v. LYNCHBURG SHOE CO.

[70 South. 689.]

PARTNERSHIP. Dissolution. Powers and liabilities of members.

The power of one partner to bind another by executing a note in the partnership name, for a debt of the firm, is at an end when the partnership is dissolved.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by Lynchburg Shoe Company against J. L. Boswell, and another formerly composing the firm of Boswell Bros. From a judgment on peremptory instruction for plaintiff, defendant, Ira Boswell, appeals.

The facts are fully stated in the opinion of the court.

John P. Edwards, for appellant.

“After a dissolution of a partnership, without consent of the other partners, no member has power to execute notes in the firm name. Such notes, though for a firm debt, binds only the member signing it.”

Brown v. Broach, 52 Miss. 536. The evidence above referred to shows the dissolution to have been made on the twelfth day of September, 1911, due notice thereof given to plaintiff below, and that more than a month later these notes were executed by J. L. Boswell, the old member, or member of the old firm, with full knowledge on the part of the plaintiff below.

A. M. Edwards, for appellee.

In addition to the general issue, Ira Boswell filed two special pleas denying under oath the liability of this indebtedness, but we find no testimony given by him in this record to substantiate his pleas, in fact he did not testify at all. We find in the case of *Jordan v. Faler*, 44 Miss. 283, and again in the case of *Sylverstein v. Atkinson, et al*, 45 Miss. 81, that whenever the name of a commercial partnership is upon negotiable paper it devolves upon the member contesting his liability to show the special facts that exonerate him. So that in the case at bar Ira Boswell is presumptively responsible for the payment of the notes because the firm name, the partnership name is upon negotiable paper and the *onus* is on him to show that he is not liable; this he did not even attempt to do; upon the other hand it is beyond doubt that

he consented to his name being used by the firm at the time the notes were given. Furthermore, from a review of the record in this case we do not believe that appellant could successfully argue here, that they have been aggrieved by the court below having given to the plaintiff a peremptory instruction.

POTTER, J., delivered the opinion of the court.

Appellee, the Lynchburg Shoe Company, filed its suit in the circuit court of Simpson county against J. L. Boswell and Ira Boswell for a balance of six hundred and twenty-one dollars and eighty cents alleged to be due on a series of notes executed in the name of Boswell Bros., formerly a partnership, but since dissolved, composed of J. L. Boswell and Ira Boswell, which notes, according to the allegations of the declaration, were executed in settlement of an open account due by said partnership for a debt contracted before dissolution. J. L. Boswell, as the declaration alleges and the exhibits show, executed the notes sued on in the name of Boswell Bros. The defendants filed a plea of general issue, and Ira Boswell filed two special pleas; both of them denying the execution of the notes, and denying that he was a member of the firm of Boswell Bros. at the time of the execution of the notes, and alleging that at the time of the execution of the notes he had dissolved his partnership with the said Boswell Bros., and denying the authority of J. L. Boswell to execute said notes so as to bind him for the payment of same. At the close of the evidence, the court, on motion of the plaintiff, granted a peremptory instruction for the plaintiff against J. L. Boswell and Ira Boswell for the full sum sued for.

The testimony in the case shows that for several years prior to September 12, 1911, there existed at Pinola, in Simpson county, a partnership composed of J. L. Boswell and Ira Boswell, and known as Boswell Bros., who conducted a mercantile business; that on the 12th day of

September, 1911, this firm dissolved and Ira Boswell moved to Greenwood, Miss., and J. L. Boswell then notified the plaintiff of the dissolution of the firm and the withdrawal of Ira Boswell therefrom in the following letter:

Pinola, Miss., 9, 12, 11.

Lynchburg Shoe Co., Lynchburg, Va.—Gentlemen: Our bank advises that they returned our July note to you, which we paid by check on the Pinola Bank July 29th. Will you please return this note to us? Now the August note is due, and we will take care of it as soon as possible. We have some changes in our business, Mr. Ira Boswell having withdrawn, but we will meet all obligations in a short time.

Yours very truly,

Boswell Bros.

(The notes mentioned in the above letter are not the ones here in controversy.)

On September 15th, in reply to the above letter, the Lynchburg Shoe Company addressed a letter to Boswell Bros., at Pinola, in which they said, among other things:

“We note that Mr. Ira Boswell had withdrawn from your firm. We beg to call your attention to the fact that the withdrawal of Mr. Boswell does not release him from any obligation incurred while a member of the firm. All that you owe us was purchased while Mr. Ira Boswell was a member of the firm; and, of course, we hold him jointly responsible for this indebtedness due us by Boswell Bros.”

After the above correspondence, which it will be noted was entirely between defendant Shoe Company and J. L. Boswell, who was then doing business in the name of Boswell Bros., the promissory notes for the alleged debt in question were executed on October 31, 1911, by J. L. Boswell alone, who signed the firm name of Boswell Bros.

This was a suit on the promissory notes executed, as above stated, on the 31st day of October, 1911, by J. L. Boswell, who was at that time conducting a business in

the firm name of Boswell Bros. These notes were given in payment of an indebtedness contracted by the firm of Boswell Bros. before it dissolved. There is no evidence that Ira Boswell authorized the execution of the notes; and the only question in the case is whether or not one partner in a firm, after a firm has dissolved, can execute notes binding on another for debts contracted during the existence of the partnership without the authority from the retiring partner to execute same.

We think it well settled in this state that after the dissolution of a partnership, the power of one partner to bind another by executing a note in the partnership name, for a debt of the firm, is at an end. *Maxey v. Strong*, 53 Miss. 280; *Brown v. Broach*, 52 Miss. 536.

This case is therefore reversed and remanded.

Reversed and remanded.

STAIGER v. STATE.

[70 South. 690.]

HOMICIDE. *Character of offense. Killing in heat of passion. Instructions.*

When on a trial for homicide, there was no testimony upon which a verdict of murder should stand, but the uncontradicted facts show that the killing was done in the heat of passion, it was error for the court to give the state any instructions as to murder.

APPEAL from the circuit court of Forest county.

HON. J. M. ARNOLD, Judge.

Joseph Staiger was convicted of murder and appeals.

S. E. Travis and E. A. Anderson and Stone Deavours,
for appellant.

Ross A. Collins, Attorney-General, for the state.

SYKES, J., delivered the opinion of the court.

The appellant, Joseph Staiger, was convicted of the murder of one A. P. Miller, in the circuit court of Forrest county, and prosecutes this appeal. The material facts upon which the state relied for a conviction are in substance as follows: About a month before the killing the appellant, Staiger, told his wife of certain derogatory remarks alleged to have been made to him by the deceased about one Mrs. Armbrecht. Mrs. Staiger repeated these remarks to Mrs. Armbrecht; and Mrs. Armbrecht told her husband of them. On the day of the killing, to wit, May 27, 1914, Mr. Armbrecht, shortly after the noon hour, called at the home of the appellant and asked him whether or not it was true that Miller had made these remarks, and when. Appellant told him that it was true, and stated the time, place, and all the circumstances under which they were made. Armbrecht, from appellant's home, then telephoned Mr. Miller, asking that Miller meet him in his (Armbrecht's) office at once. Miller was a bookkeeper, and in the morning kept the books of Armbrecht, who was in the lumber business, and in the afternoon worked for a drug store there in the city of Hattiesburg. Armbrecht had two offices on the second floor of the Ross Building, one of which was occupied by the bookkeeper and stenographer, and the other was his private office. Appellant, Staiger, was in the insurance business, and had his offices on the third floor of the same building. In the course of the conversation between Staiger and Armbrecht at Staiger's house Armbrecht told Staiger that he intended to discharge Miller. Some days before the killing appellant's wife had gone to Kansas city; and on the day in question appellant was pack-

ing up preparatory to breaking up housekeeping, and intending to leave Hattiesburg that day to join his wife. The testimony of appellant, which is not contradicted, is that about a year previous to the difficulty he had purchased a pistol which he kept in his home; and on the day of the killing he put the pistol in his trousers pocket, intending to take it down to his office and give it to his stenographer to raffle off along with a shotgun which the stenographer intended to raffle; that this was done before his conversation with Mr. Armbrecht. Shortly after Armbrecht left he telephoned to Staiger, from his office, that Miller was there and denied making the statement, and he (Armbrecht) requested that Staiger come by his office that afternoon. To this Staiger replied that he would call at Armbrecht's office. Armbrecht testified that within a short time after this conversation Staiger came into his office; that at this time Mr. Miller had left the private office of Armbrecht and was in the front office, occupied by the stenographer, and by Miller during the mornings; that as soon as Staiger came he (Armbrecht) called Miller back in the office; that Miller came back, shut the door, and stated he did not make the statements, and that Staiger stated that he had, and called Miller a liar; that Miller reiterated he did not make the statements, and upon his part called Staiger a liar. According to Armbrecht:

The lie was passed back and forth several times, until finally the defendant stated to the deceased: "You are larger than I am, Mr. Miller, but I am not afraid of you. You have called me a liar several times." And Mr. Miller then said, 'You are a liar;' and Mr. Staiger said, 'You are a crook;' and Mr. Miller hit him."

Armbrecht said he saw Miller hit Staiger twice, knocking him either to the floor or back in a chair, and that Miller fell on top of the appellant. At this time the defendant shot one time, the bullet striking Miller in the forehead, from which wound he became unconscious almost immediately, and died within a short time thereafter.

Armbrecht did not see the defendant strike or attempt to strike the deceased. All testimony shows that the deceased, Miller, weighed about one hundred and eighty or one hundred and ninety pounds, and was a man of great muscular development, and that the defendant weighed about one hundred and forty pounds, and was in no sense the equal, physically, of the deceased. The testimony further shows that there were several very bad bruises sustained by the defendant in the fight, and that the deceased was on top of and beating the defendant at the time of the killing. There were no eyewitnesses present at the time of the killing save Armbrecht and the defendant. The defendant testified that, when the deceased knocked him down into a chair, he (deceased) reached for a portable telephone instrument, and it was then that defendant, believing that his life was in danger, pulled his pistol from his pocket and shot the deceased. The defendant contradicted Armbrecht as to some of the details of the quarrel leading up to the tragedy; but, under our view of the case, we are stating the facts most strongly for the state.

The theory of the state in this case is that the defendant armed himself with a deadly weapon for the purpose of looking up the deceased to provoke a difficulty with him and kill him. This is shown by the following instruction given for the state:

"The court instructs the jury for the state that, if the jury is fully satisfied from the evidence beyond all reasonable doubt and from all the evidence in this case that the accused was looking for Miller to kill him, armed with a deadly weapon provided for that purpose, and that when he found the deceased he provoked a difficulty with him, or was the aggressor in the difficulty in which he killed the deceased, then he is guilty of murder, even though he killed the deceased in self-defense, and the jury shall so find; and this is true no matter how great the physical difference was between the size of defendant and deceased."

The state was given two other instructions embodying this same theory.

This was error, There is no testimony in this case upon which a verdict of murder should stand. The uncontradicted facts show that the killing was done in the heat of passion; whether in self-defense or not is a question to be decided by the jury. We therefore hold that the court erred in giving the state any instructions as to murder.

For these reasons, the case is reversed and remanded.

Reversed and remanded.

BARKSDALE v. GRILLCRIST-FORDNEY CO.

[70 South. 691.]

TAXATION. *Sale of lands for taxes. When lands subject to taxation.*

Lands entered from the United States Government became subject to taxation by the state when the entryman received a final certificate adjudging him to be the owner thereof and before the receipt by him of the patent thereto.

APPEAL from the chancery court of Smith county.

HON. SAM WHITMON, JR., Chancellor.

Bill by the Grillerist-Fordney Company against S. W. K. Barksdale. From a decree for complainants, defendant appeals.

The facts are fully stated in the opinion of the court.

R. H. & J. H. Thompson and Fulton Thompson, for appellant.

The chancellor and the solicitors for the appellant must have overlooked the Act of Congress approved January

26, 1847, published in Mississippi, Code 1857, page 696, wherein Congress expressly assented to the several states admitted into the Union prior to the 24th of April, in the year of our Lord one thousand eight hundred and twenty, to impose a tax or taxes upon all lands thereafter sold by the United States in said states from and after the day of such sale. Mississippi became a state in 1817.

The question, therefore, and the only question in this case, is, when did the United States sell the land to Hancock? We insist, and the authorities cited in the brief of our associates show, that the sale was completed and perfected in July, 1894, when the final certificate was issued.

We have a section in our Code, Code 1906, section 1959, in perfect harmony with this view.

It is a well known fact, of which this court will take judicial notice, that United States patents are frequently delayed for years after the government has ceased to be interested in the land, and thousands of acres of land in this state have never had patents. To hold that the land was not taxable until a patent was issued and delivered would be a very severe blow to the revenues of the state.

T. J. Wills, for appellee.

The case turns upon the question of the correctness of the ruling of the chancellor in sustaining the demurrer to appellant's cross-bill. If the demurrer was correctly sustained, then the order of the court striking the answer of appellant and entering a decree *pro confesso*, and thereafter a final decree in favor of appellee, was correct.

The answer and cross-bill of appellant with the references thereto made to the assessment of the land for taxes, and the sale therefor, we think show conclusively that the sale was illegal and void. The land was assessed in 1892 at the regular quadrennial assessment provided for by statute, and was assessed to owner unknown, together with four other 40's making six 40's assessed and valued

together in one inseparable valuation to unknown owner. This assessment was illegal and void because in 1892 the land was a part of the public domain, and was void at that time and could not have authorized the tax collector to sell the land for unpaid taxes. To authorize and empower the tax collector to sell the land for delinquent taxes thereon after the lands had become segregated from the public domain and become private property subject to taxation, a legal and valid assessment must be made in manner and form as provided by statute, to the owner if known, to the unknown owner if the name of the owner cannot be ascertained, and this assessment after the land becomes subject to taxation is a condition precedent to the power and authority of the tax collector to make a valid sale and convey title to the state or an individual for the delinquent taxes.

We call the court's attention especially to the case of *Hoskins v. Ill. R. R. Co.* 78 Miss. 768, 29 So. 518, as authority for the position herein taken. Counsel for appellee cites this case with the following quotations:

"Land entered under the homestead laws of the United States cannot be sold for taxes assessed before the time at which a right to a patent is perfected."

Counsel inadvertently misquotes the case. By reference to the Southern Reporter we find that the court said: "Land entered under the homestead laws of the United States cannot be sold for taxes before the time at which a patent is perfected."

Counsel for appellant underscores the word "right," which does not appear in the reported case in Southern Reporter, and which puts entirely a different meaning in the language of the court from that used by the court, and the case is authority for the position we have taken, and condemns the contentions of appellant. It was upon the authority of this case, perhaps, more than any other authority, that the chancellor sustained the demurrer and struck the answer, and entered the decree in favor of appellee.

The contention of appellant that upon issuance of the final receipt the land became segregated from the public domain and became subject to taxation, can afford appellant no consolation in this case. Upon the compliance on the part of the purchaser from the government of a part of the public domain by making his final proof or the payment of the purchase price, and the issuance of a final receipt from the government for the money therein paid, places an equity in the purchaser, but the legal title remains in the government with the right within a reasonable time for the cause shown to cancel the entry, and if such steps are not taken within a reasonable time then the purchaser's right to a patent becomes absolute and the complete equitable title is vested in him, the government holding the bare legal title for his use and benefit. But sure it is that a reasonable time must be allowed the government, acting through its proper officials and clerks, in which to issue the patent and divest the government of the title and place it in the purchaser. In this case the entryman was not clothed with the legal title, nor the right to the legal title until a reasonable time had elapsed for the making of a final proof in which the issuance of the patent might be made, and we submit that from July 3, 1894, to July 27, 1895, was not an unreasonable time, an entryman was not called upon to have his land assessed, and the land was not subject to taxation prior to his right to receive a patent from the Government.

SMITH, C. J., delivered the opinion of the court.

Appellee by his bill seeks to cancel the claim of appellant to the timber growing on certain land described therein as a cloud on its title. According to the allegations of the bill, the land was entered from the United States government under the homestead law by Joel W. Hancock; he having received a patent therefor in July, 1895, and the title of appellee being deraigned from him. Appellant filed an answer and cross-bill in which he ad-

mitted the entry of the land by Hancock and the receipt by him of the patent thereto, and alleged that on the 2d day of July, 1894, Hancock made his final proof and received his final certificate from the register of the United States land office; that the land was duly and legally assessed for the taxes of 1895, and duly and legally offered for sale by the tax collector for the collection thereof in 1896, at which sale it was acquired by the state, and afterwards conveyed by it to appellant. A demurrer to this cross-bill was sustained by the court, and a decree rendered in accordance with the prayer of appellee's bill.

The sole question presented to us by this record is: "Did this land become subject to taxation by the state upon the receipt by Hancock of the final certificate adjudging him to be the owner thereof, and before the receipt by him of the patent thereto?" That it must be answered in the affirmative will appear from an examination of *Carroll v. Safford*, 3 How. 441, 11 L. Ed. 671; *Hoskins v. Railroad Co.*, 78 Miss. 768, 29 So. 518, 84 Am. St. Rep. 644.

Reversed and remanded, with leave to appellee to answer appellant's cross-bill within thirty days after the filing of the mandate in the court below.

Reversed and remanded.

STATE v. BOYD.

[70 South. 692.]

HABEAS CORPUS. Remedy by appeal. Right to relief.

A writ a *habeas corpus* cannot successfully be invoked on the ground that a verdict in a felony case was taken in the absence of the trial judge, where the judgment was entered by the clerk and was in all respects regular on its face, since the taking of the verdict was a mere irregularity which could have been corrected by motion and appeal in the trial court that convicted petitioner.

APPEAL from the circuit court of Attala county.

HON. J. A. TEAT, Judge.

Gordon Boyd sued out a writ of *habeas corpus* against the state to secure his release from custody after conviction of a felony. From an order discharging him, the state appeals.

Lamar F. Easterling, Assistant Attorney-General, for the state.

The two questions presented to this court on this record for decision, are first, whether or not the verdict of the jury rendered as shown in the record, in the absence of the trial judge, was a valid verdict, and second whether or not the trial judge had jurisdiction to entertain a writ of *habeas corpus* and discharge the accused from custody.

I have failed to find any case decided by this court upon the precise points here in question. In the case of *Sherrod v. State*, 93 Miss. 774, this court, speaking through Whitfield, Judge, committed itself to the doctrine, that a defendant on trial for a crime other than a capital felony, who is on bond may waive the right to be present when a verdict is received. To the same effect see: *Price v. State*, 36 Miss. 531, 72 Am. Dec. 1915; *Giles v. State*, 64 Miss. 105.

In the *Giles Case*, *supra*, the court held that it was not unlawful or improper for the court to enter a judgment of forfeiture against the defendant and to receive the verdict of the jury in his absence. Of course the reasoning of the court is based upon the implied waiver on the part of the accused to be present at the time of the rendition of the verdict. The court cites: 1st Bishop Cr. Pro., sec. 272; *Price v. State*, 36 Miss. 531; *Fight v. State*, 7 Ohio 357; *State v. Wamine*, 16 Ind. 357.

In the *Price Case*, 36 Miss. at page 542, Judge Handy speaking for the court said: "The general rule is, that the verdict, in cases of felony, must be delivered in open

court, and in the presence of the defendant. 1 Chitty Cr. L., 636. This rule is founded on two reasons: First, the right of the defendant to be present, and to see that the verdict is sanctioned by all the jurors; and secondly in order that the defendant, if convicted, may be under the power of the court, and subject to its judgment. The right of the defendant to be present, proceeds upon the presumption that he is in custody, and has no power to be present, unless ordered by the court to be brought into court. But, under our law, he may waive that right. If he is not in custody, so as to be deprived of the power to attend, it would seem that the reason of the rule as to his right to be present would fail; for he is voluntarily absent when he ought to be present, and cannot complain of the consequence of his own voluntary act. His voluntary absence must be taken to be a waiver of his right to be present. But upon another view of the circumstances of this case, he cannot be heard to take any advantage of his absence when the verdict was rendered. He was present in court when the trial was commenced, and when the case was put to the jury; and though under recognition of bail before that time, for his appearance to answer the charge brought against him, he was no longer at liberty, but was in custody of the law. If he afterwards withdrew from the court or escaped so as not to be present at the return of the verdict, it is by his own unlawful act, of which he should not be permitted to take advantage. His absence must be considered, at least as a waiver of his right to be present; and his own illegal act should not be permitted to thwart the process of the law to his advantage."

It is therefore clear that under the decision in this case the doctrine of waiver is clearly established.

As stated by Judge Handy in the *Price Case*, *supra*, the rule requiring the presence of defendant was founded upon the right of the defendant to be present and to see that the verdict is sanctioned by all the jurors. In other words to allow the defendant to poll the jury.

In the case of *State v. Austin*, 108 N. C. 780, a case almost identical with the one now before the court, the court said: "As soon as the jury had retired, after receiving the charge, the court instructed the clerk, from the bench, in a clear and distinct voice, to receive the verdict, and to have the defendants present. The defendants' counsel had then left the court room, and defendants had no knowledge of and did not consent to the order. On the return of the jury the clerk received the verdict, both defendants being present. The defendants afterwards moved for a new trial and in arrest of judgment, on the ground that the verdict was received in the absence of the judge and of defendant's counsel and in the recess of the court. The case also states that while the jury were considering their verdict the judge remarked in the presence of the defendants' counsel that he had instructed the clerk to receive the verdict, and the counsel made no response; that as the jury came into the courthouse the clerk told another of defendants' counsel that he was going to take the verdict; that he asked if the judge was present, and the clerk replied that he was not, and had instructed him (the clerk) to receive the verdict; that the counsel then did not go into the courtroom, but went to the solicitor and told him of the conversation; that in reply to the solicitor's inquiry if he would consent to the clerk's receiving the verdict he replied that he would not, but before the solicitor could reach the courtroom the verdict had been rendered. The defendants had the right to have the verdict rendered in the presence of the judge, and it is best that it should always be done. But, it is certainly competent, except in capital cases, for it to be received by the clerk if no exception is made, and the opportunity is given the defendant to object, "and such practice is very common." Pearson, C. J., in *Houston v. Potts*, 65 N. C. 41. Indeed, in all cases not capital the defendant may even waive his own right to be present, either expressly (*State v. Epps*, 76 N. C. 55), or by voluntarily withdrawing himself from the jurisdiction of the

court (*State v. Kelly*, 97 N. C. 404; *State v. Jacobs*, 107 N. C. 772), though his counsel cannot waive it for him. (*State v. Jenkins*, 84 N. C. 812.)

In the present instance the defendants were both present in the courtroom when the verdict was rendered, and made no objection to the absence of judge or their counsel. Had they done so, doubtless the judge and the counsel would have been sent for, or if that had been refused the defendants could have then presented the matter as ground for a new trial to the court below, and if refused, have appealed.

Crawley & Glass, for appellee.

There is no question but that the court had taken a recess (see agreed statement of facts, page 20 of record); that the court was absent from the courtroom at the time the verdict was received by the clerk and the jury dispersed. Can there be a duly and legally constituted court without a judge? If the appellee can waive the right in a felony case of the presence of the judge at the time of the receipt of the verdict, he can also waive the right of a jury, and the judge who is presiding at the time, or the district attorney who prosecutes for the state, may sit in judgment. See 12 Cyc., page 731 (X. V. A. 2); "A verdict should be received in open court by the trial judge, and his delegation of this power to another, although by consent of the parties, is ground for a new trial."

12 Cyc., page 686 (14 K. I. B): "A verdict which is received after the expiration of the term is void, unless the court has no power to receive it under a statute. So, a verdict delivered to the clerk during recess, without the permission of the court or the consent of the parties, and in the absence of the defendant and the judge, should be set aside and a new trial ordered."

In 12 Cyc. page 686 (k. 1) the rule is laid down as follows with reference to the delivery of the verdict:

"The verdict, in all cases of felony must be delivered in open court." *Jackson v. State*, 102 Ala. 76, 15 So. 351.

In this case, the trial judge received the verdict of the jury after a recess had been taken by the court, at his room in the hotel where he was staying. The court, in delivering the opinion held that where the jury had separated after the rendition of the verdict which was void because delivered to the judge outside of the courthouse, that the defendant in that case was entitled to be discharged, having been placed once in jeopardy. Following the reasoning of the court in that case, the appellee should have been discharged from the custody of the court upon his motion. At any rate there can be no question under the authorities cited as to the illegality of the verdict.

In *Elerbe v. State*, 22 So. 950, the court in delivering its opinion said, in part: "If we could consider the statement of facts as showing such absence from the room on the part of the judge as constituted even a temporary relinquishment of the control of the court, and of the conduct of the trial, we should unhesitatingly reverse the judgment. There can be no court without a judge, and his presence, as the presiding genius of the trial is as essential during the argument as at any other time

. . . In civil cases, or prosecutions for misdemeanors he may give place to another by consent, and if he does so, without objection in advance, consent will perhaps be presumed; but in prosecutions for felony no consent can be given, and if given it will not be binding on the accused.

. . . When the court is once opened the presence of the judge is necessary at all times. (Works on Courts and their Jurisdiction, page 87.)"

The court in the same case, commenting further upon the facts as presented by the record say: "If this error were a mere technical one, not vital in its nature, we would not for that alone reverse the judgment, but the error here is of the gravest character. It goes to the very organization and constitution of the court trying the appellant on the charge of murder."

In *The State v. Jackson*, 21 S. D. 494, the court held: "As a judge is an essential constituent of a court, there can be no court in the absence of the judge or judges. Consequently, a verdict in a criminal case, which is received by the clerk in the judge's absence is void, even though authority to receive it has been delegated by counsel."

If the verdict in this case, following the reasoning of the cases cited above is void, then no valid judgment of the court can be predicated upon it.

In *Scott v. State* reported in Vol. 11 of the Southern Reporter on page 657, Judge Woods of this court said: "Where the record shows that judgment was entered against a prisoner on a verdict returned by a jury of eleven men such is an error and constitutes a fatal defect affecting the jurisdiction of the court . . . and therefore, the verdict and the judgment founded on it are void and the prisoner is in the same condition as if he had not been tried . . . The court undoubtedly had jurisdiction of the person of the relator, and of the subject-matter, and ordinarily, no other question will be considered on *habeas corpus*. But, in the present instance we see indisputably that the intervention of an unauthorized agency, where by the defendant's guilt of the crime laid to his charge was established, the jurisdiction of the court was broken and lost. There was no power to pronounce judgment, because there was no verdict of guilt on which to base it. In our view, the relator stands just as if he had not been tried at all. The verdict is a nullity, and the judgment upon it is a nullity."

It therefore follows as a logical consequence that the trial court in this case should not only have entertained jurisdiction of the appellee's petition for a writ of *habeas corpus*, but that the verdict being a nullity, and the sentence of the court pronouncing it being a nullity, that the appellee should have been discharged from the sentence of the court.

HOLDEN, J., delivered the opinion of the court.

This is an appeal by the state from a judgment of the circuit judge of Attala county releasing the appellee, Gordon Boyd, from custody on conviction of a felony; the action being instituted by a writ of *habeas corpus* sued out by appellee. The history of the proceedings in the court below is, briefly, as follows:

Appellee was tried at the September, 1913, term of the circuit court of Attala county for assault and battery with intent to kill and murder, and was convicted by the jury. It seems that, while the circuit judge was away from the courtroom, the jury returned their verdict to the circuit clerk, who received it and discharged the jury; all of which was done in the absence of the trial judge, but in the presence of the accused and his counsel, who made no objection to this proceeding at the time. Afterwards, a motion was made by appellee to set aside the verdict of the jury because it was returned in the absence of the trial judge. This motion was sustained by the court. On the same day, the circuit judge entered an order admitting appellee to bail. Thereafter, on the next day, a motion was filed to discharge appellee from the custody of the sheriff, setting up the fact that the verdict of the jury was received in the absence of the trial judge. This motion was by the court overruled. It further appears that afterwards, on the same day, the appellee moved the court to set aside the order of the court setting aside the former verdict of the jury, which motion was granted and appellee was allowed to withdraw his former motion, and the order of the court, setting aside the verdict, was set aside. It also appears that afterwards, on the same day, the circuit judge entered an order sentencing the defendant, upon the judgment of conviction, to a term of five years in the state penitentiary, and ordered that he be remanded to the custody of the sheriff. Following all of this, and on the same day, the appellee sued out a writ of *habeas corpus* before the same circuit judge, setting out

the fact that the jury had returned a verdict in the absence of the judge; and that said verdict, judgment, and sentence of the court was void; and asked that the appellee be discharged from the custody of the sheriff. The district attorney appeared and filed an answer for the sheriff, in which he admitted the facts to be true as set out in the petition for the writ of *habeas corpus*; and it was further agreed between the counsel on both sides that the appellee and his counsel were present when the verdict was returned and received by the clerk, and that they made no objection thereto at the time. At the conclusion of the *habeas corpus* trial, the judge entered an order discharging appellee from further custody, and taxing the state with the costs. Five days thereafter, the trial judge entered another order in his court, commanding the clerk to issue a *capias* for the arrest of appellee. This was done, and he was placed under a bond in the sum of five hundred dollars for his appearance at the next term of the circuit court for trial on the original indictment.

It clearly appears from the record here that there was a valid and lawful judgment upon its face rendered in the circuit court, based upon a conviction by the jury, and that the appellee was sentenced to a term in the penitentiary under this judgment of the court.

We do not think that the writ of *habeas corpus* may be successfully invoked in this case. If it be true that the rendition of the verdict by the jury to the clerk, in the absence of the circuit judge, was error and an irregularity, this should have been corrected by motion and appeal in the trial court that convicted appellant on the indictment. As the judgment of the lower court appears from this record to be regular and lawful in all respects, it was not permissible at the hearing of the writ of *habeas corpus* to inquire into any alleged errors or irregularities in the proceedings behind the judgment. *Ex parte Grubbs*, 79 Miss. 358, 30 So. 708; *Scott v. State*, 70 Miss. 247, 11 So. 657, 35 Am. St. Rep. 649; *Murrah v. State*, 51 Miss. 652; section 2446, Code of 1906. Therefore the court

erred in admitting, in the *habeas corpus* hearing, any evidence attacking collaterally the validity of the judgment under which the appellee was then in custody.

“The authorities are uniform and very numerous in holding that the writ of *habeas corpus* cannot be made to perform the functions of a writ of error or an appeal, and that a person in custody under a judgment or order of a court of competent jurisdiction . . . cannot obtain his discharge on *habeas corpus* on account of mere errors or irregularities, however gross, in the judgment or in the proceedings on which the judgment was founded. . . . (This) doctrine has long since passed beyond the domain of dispute.” Am. & Eng. Encl. Law, vol. 15, pp. 172, 173.

In view of these conclusions, we hold that the circuit judge below committed error in discharging the appellee under the writ of *habeas corpus*.

We do not pass upon the question as to whether the verdict of the jury, rendered in the absence of the circuit judge, was erroneous and invalidated the judgment, for the reason that no inquiry should have been made in this case as to the proceedings back of the judgment; consequently, this question is not properly before us. So far as this record discloses, the appellee now stands in the attitude of an escaped convict.

This case is reversed, and the petition of appellee is dismissed.

Reversed and dismissed.

DEAN v. BOWLES.

[70 South. 693.]

1. JUSTICE OF THE PEACE. *Affidavit. Amendments. Execution. Claim of property. Defenses. Fraudulent conveyances. Sale in Bulk.*

Where plaintiff recovered judgment in a justice of the peace court and made affidavit for immediate execution under Code 1906, section 2743, but the justice of the peace omitted to attach his signature to the jurat thereto, a claimant of the property levied upon under such execution cannot complain that the circuit court on appeal permitted the justice of the peace who issued the execution to attach his signature to this jurat over his objection, since no one but the defendant in execution can complain of the premature issuance thereof.

2. JUSTICE OF THE PEACE. *Execution. Claim to property. Defenses.*

Where plaintiff recovered judgment on a note in a justice of the peace court, and execution was levied upon property claimed by another, such claimant cannot defeat the execution on the ground either that there had been an attempt to materially alter the note sued on or that the action on the note was prematurely brought for neither of the objections can be inquired into in a collateral proceeding.

3. FRAUDULENT CONVEYANCE. *Sale in Bulk. Statutes.*

One purchasing in violation of the Bulk Sales Act (Laws 1908 chapter 100), acquires no right as against creditors of the seller.

APPEAL from the circuit court of Leflore county.

HON. MONROE MCCLURG, Judge.

Suit by M. A. Bowles against T. E. Williams and W. S. Wallace, begun in justice of the peace court, where there was a judgment for plaintiff. On levy of execution J. T. Dean intervened as claimant. From a judgment against claimant, he appeals.

On April 10, 1909, appellee instituted suit in a court of a justice of the peace against T. E. Williams and W. S. Wallace upon a note due April 13, 1909. On the same day this judgment was rendered, execution was issued thereon and levied upon the property here in controversy,

claim was made thereto by appellant, and the cause, having reached the court below by appeal, was tried upon the claimant's issue, which resulted in a peremptory instruction being given the jury to find for appellee. There was a verdict and judgment accordingly, hence this appeal. Appellee signed an affidavit on the date of the issuance of this execution, complying with the provisions of Code 1906, sec. 2743; but the justice of the peace omitted to attach his signature to the jurat thereto. On the trial of the cause in the court below, the justice of the peace who issued the execution was permitted to attach his signature to this jurat over the objection of appellant. The property levied upon consists of goods, wares, and merchandise which appellant claimed to have purchased from Wallace, one of the defendants in execution.

Gardner & Whittington, for appellant.

S. R. Coleman, for appellee.

SMITH, C. J., delivered the opinion of the court.

(After stating the facts as above). The amendment of the affidavit, by adding the name of the justice before whom it was made to the jurat thereto, was unnecessary for the reason that no one but a defendant in execution can complain of the premature issuance thereof. 1 Freeman on Executions, section 25.

Two of appellant's assignments of error are: First, that an attempt had been made to materially alter the note upon which the judgment on which the execution in question was issued was rendered; and, second, that the suit on which this judgment was rendered was prematurely brought. Neither of these objections can be inquired into in a collateral proceeding such as the one here under consideration. The cases of *Wiggle v. Thomson*, 11 Smedes & M. 452, and *Winston v. Miller*, 12

Smedes & M. 50, cited by counsel for appellant in support of the second objection herein referred to, are not here in point for the reason that the question there arose on direct appeals from the judgments complained of.

The sale of the property here in question having been made to appellant in violation of our Bulk Sales Law (Laws 1908, chapter 100), the court below committed no error in granting the peremptory instruction.

Affirmed.

ECHOLS v. STATE.

[70 South. 694.]

1. **HOMICIDE. Dying declaration. Condition of declarant. Evidence. Necessity of objection. Instructions. Manslaughter.**

A dying declaration should be admitted in evidence where it clearly appeared that it was made at a time when deceased was in *extremis* and fully conscious of his impending dissolution.

2. **HOMICIDE. Appeal. Evidence. Necessity of objections.**

Where no specific objection was made in the lower court to the testimony in regard to a dying declaration, such objection cannot be made for the first time on appeal in the supreme court.

3. **HOMICIDE. Instruction. Manslaughter.**

Where on the trial of a case for homicide, the testimony submitted to the jury, viewed from different angles, and considered from different viewpoints as a whole and, separately, was sufficient to justify the jury in coming to the conclusion that the killing was unlawful and was not in self-defense but that it was not done "with malice aforethought," but in the heat of passion or upon sudden provocation, an instruction on manslaughter was properly given.

APPEAL from the circuit court of Marshall county.

HON. J. L. BATES, Judge.

Will Echols was convicted of manslaughter and appeals.

The facts are fully state in the opinion of the court.

Lester G. Fant and *W. A. Belk*, for appellant.

Lamar F. Easterling, Assistant Attorney-General, for the state.

HOLDEN, J., delivered the opinion of the court.

Appellant, Will Echols, was charged with murder in the circuit court of Marshall county, and convicted of manslaughter, from which he appeals. The two errors assigned by appellant which deserve consideration are: (1) That the court erred in admitting the testimony of Drs. McAuley and Barnett as to the alleged dying declarations of the deceased, Jim Alexander; and (2) that the court erred in granting the state an instruction on manslaughter, and that the verdict of manslaughter is not supported by the evidence in the case.

The record shows that shortly after the deceased, Alexander, was shot in the bowels with a shotgun, and while he was lying upon the ground where he fell, Dr. McAuley arrived on the scene, and, after an examination of the wounded man, informed him that "there was no chance for him." The deceased then stated to Dr. McAuley "that he knew he was going to die," and then told Dr. McAuley that he (deceased) was coming from a picnic in a buggy with another negro man, Louis Dean, when they stopped near appellant's house, and Dean went into the house to get a drink of water while he (deceased) waited on the outside in his buggy; that appellant came to him and said he wanted to talk to him about "him interfering with his wife;" that deceased said to appellant, "If I were to tell what I know on you, there would be trouble

sure enough;" and that appellant, Echols, immediately shot the deceased. A few minutes after this statement was made by deceased to Dr. McAuley, Dr. Barnett arrived at the scene; and he heard Dr. McAuley state to deceased that "he was bound to die," and the deceased then told Dr. Barnett that appellant shot him, and made practically the same statement to Dr. Barnett as to how the shooting occurred that he had a few minutes before made to Dr. McAuley.

We think the testimony of both Drs. McAuley and Barnett was properly submitted to the jury as the dying declaration of the deceased, Alexander, as it clearly appears here that the declarations made by the deceased to both doctors were made at a time when he (the deceased) was *in extremis* and fully conscious of his impending dissolution. *Lipscomb v. State*, 75 Miss. 559, 23 So. 210, 230; *Guest v. State*, 96 Miss. 880, 881, 52 So. 211.

According to the record, there was no specific objection made by appellant in the lower court to the testimony of Dr. Barnett; and such objection cannot be made here for the first time.

The contention of appellant that the instruction on manslaughter was error, and that he was guilty of murder or nothing, and that the jury was not warranted in finding him guilty of manslaughter under the proof in this case, we think is untenable, as the testimony submitted to the jury, viewed from different angles and considered from different viewpoints as a whole and separately, was sufficient to justify the jury in coming to the conclusion that the killing was unlawful and was not in self-defense, but that it was not done "with malice aforethought" but in the heat of passion or upon sudden provocation. The jury may have entertained a reasonable doubt as to whether or not the appellant acted with malice aforethought, and at the same time believed beyond a reasonable doubt that the shooting was unlawful and not in necessary self-defense.

It would make this opinion too lengthy to set out all the testimony in the record which tends to prove the elements of manslaughter in this case; but we shall refer only to the testimony of three witnesses: Essex Suggs' testimony, page 13 of the record, which, if believed by the jury, showed that appellant claimed that he did not know whom he had shot, or, in other words, that he had shot a man whom he did not know and had nothing against, indicating strongly that the shooting was done without premeditation or malice aforethought. The dying declaration of deceased, Alexander, showed that a conversation took place between him and appellant immediately prior to the shooting, resulting in hot words which may have suddenly provoked the shooting. The testimony of appellant, which the jury had a right to believe in whole or in part, may have convinced the jury that appellant was suddenly provoked to do the shooting.

We shall not attempt to invade the province of a jury in passing upon the facts in any case, and we are not prepared to say in this case that the facts here did not warrant the jury in convicting the appellant of manslaughter.

We have not overlooked the fact that the rule announced in *Huston v. State*, 105 Miss. 413, 62 So. 421, can be applied in the case here; but we think it is unnecessary to rely upon the *Huston Case* in order to affirm the case now before us.

Affirmed.

BRADBERRY v. ADAMS STATE REVENUE AGENT.

[70 South. 697.]

1. ASSIGNMENT FOR BENEFIT OF CREDITORS. *Partial assignment. Concealing assets. Validity. Preferring creditors.*

Under the facts as set out in this case the court held that there was no evidence supporting the charge that the assignment was fraudulent and that the assignment was not a general assignment but a valid partial assignment and that the property of the debtor not embraced in the assignment was not "trifling in amount" or value.

2. ASSIGN FOR BENEFIT OF CREDITORS. *Preferring creditors first.*

A debtor has a perfect right to pay his general creditors first.

APPEAL from the chancery court of Marshall county.

HON. D. M. KIMBROUGH, Chancellor.

Suit by Wirt Adams, state revenue agent, against W. B. Bradberry, trustee to set aside an assignment for creditors. From a judgment for plaintiff, defendant appeals.

The state revenue agent filed a bill in chancery against one Allison to recover on behalf of the state, county, and city the statutory penalty for the unlawful sale of intoxicating liquors. No attachment was filed. During the trial of the case, but before judgment (November 12, 1912), Allison made an assignment of the property described in the instrument to Bradberry, trustee, for certain named creditors, including all except the revenue agent's claim.

After the expiration of twenty-four hours from the filing of the assignment the revenue agent filed a bill in chancery (November 13th) against Allison and Bradberry to set aside the assignment, alleging that it was tainted with fraud, and furthermore that it was a general assignment in that it attempted to convey to the trustee all the property of the assignor, except a small

or trifling amount thereof. An attachment was at once issued and levied by the sheriff; his return showing that the only property he could find after diligent search and inquiring of Allison, over and above the property assigned to the trustee, and certain real estate then covered by a deed of trust held by the bank to secure an indebtedness amounting to more than the value of the property included in the deed of trust, was a certain lot assessed at ninety dollars and some coal worth about one hundred dollars.

Afterwards execution was issued against Allison, in the first case and levied by the sheriff, who testified at the hearing of the instant case that he called upon Allison and was told that he had no other property than that embraced in the assignment or covered by the deed of trust or covered by the attachment issued in the instant case.

The defendants in the May, 1913, term of court denied fraud and alleged that the assignment was partial, as it only embraced certain specific property described in the instrument which the assignor transferred to the trustee for the benefit of certain preferred creditors, and that at the time of the making of the assignment the assignor had on deposit five hundred dollars in bank in money and some property in the state of Tennessee worth about one thousand dollars, which he had since spent and disposed of, and on the hearing of the instant case testified in support of this allegation of the answer, which fact was not contradicted by any testimony offered by the complainant. The chancellor set the assignment aside, and the trustee appeals in behalf of the creditors for whom the assignment was made.

It is the theory of the appellee that the assignment was clearly made by Allison for the purpose of preferring all of the other creditors and defeating the judgment about to be rendered against him in favor of the appellee, and that he conveyed to the trustee all his visible assets except an amount trifling and insignificant as compared with the indebtedness owing to the preferred creditors

and as compared with the value of the property assigned, which was valued at about six thousand dollars and that, since he failed or refused to disclose to the sheriff the fact that he owned other property, which fact could not be ascertained from the records, the assignment was general in effect, in that it conveyed to the trustee for preferred creditors practically all of the property of value, except the cash in bank and land in Tennessee which he concealed from the sheriff.

It is the theory of the appellant that the assignment is partial only, in that only a portion of the property owned by the assignor is conveyed, and that he had a right to prefer one set of creditors over another.

Cook, P. J., delivered the opinion of the court.

The revenue agent, appellee here, recovered a judgment against one Allison for the statutory penalty for selling intoxicating liquors, and filed a bill of complaint in the chancery court to set aside an assignment executed by Allison to appellant for the benefit of certain specified creditors of the assignor, upon the grounds that the assignment was fraudulently executed for the purpose of defeating the collection of the penalties by the revenue agent, and because, the assignment being a general assignment, and the statute governing this class of assignments not having been complied with, the same was void.

We can find no evidence in the record which supports the charge that the assignment was fraudulent. It was the opinion of the chancellor, and he so decided, that the assignment was a general assignment. We have carefully gone over the evidence, and find that all of the evidence indisputably shows that the assignment was, in fact, a partial assignment. The issue was submitted upon depositions, and without dispute or attempt at contradiction all of the evidence touching this feature of the case established that the assignor owned something like

two thousand dollars worth of property, none of which was included in the assignment. The property not embraced in the assignment was not "trifling in amount" or in value; but, on the contrary, the value of the property not assigned was, relatively speaking, quite substantial. The record merely shows that Allison preferred to pay his general creditors first; and this he had a perfect right to do.

The decree will be reversed, and judgment entered here dismissing the bill.

Reversed.

SELIG v. TROST ET AL.

[70 South. 699.]

1. *WILL. Construction. Power of testamentary disposition. Executory devise.*

- When a testator by will gave all of his property to his wife, with full power to mortgage or sell it and to give perfect title thereto, and providing that after her death the residue should be divided equally among his children. In such case the wife has the use and enjoyment of the property during her lifetime, with full power to mortgage or sell it and in the event it or any portion thereof should not be sold by her, it should be divided after her death equally among his children.

2. *WILLS. Construction. Executory devise.*

Such a will must be construed as a whole, but if it were permissible to construe the two clauses of it separately, and if by so doing to hold the first to be a devise in fee, the limitation over contained in the second clause would be void as an executory devise.

APPEAL from the chancery court of Londes county.

HON. J. F. MCCOOL, Chancellor.

Suit between William Trost and others, executors, and Mrs. Hanna L. Selig for construction of the will of Samuel Selig deceased. From a decree for complainant, defendant appealed.

The facts are fully stated in the opinion of the court.

W. H. Kier, for appellant.

Owen & Garnett, for appellee.

SMITH, C. J., delivered the opinion of the court.

The will of Samuel Selig, deceased, submitted to us by this record for construction, contains the following item:

"First. I will and bequeath all the property of which I may die possessed, real, personal and mixed to my beloved wife Crescentia, to use, enjoy and control the same and the proceeds thereof, with the full power to sell, mortgage and dispose of the same and to make good and perfect title thereto.

"Second. After the death of my said wife, I desire and will that what remains of my said property shall be divided equally between my children, share and share alike; the share of any one who may be dead to go to his or her heirs. In no wise however to be construed to limit the power of my said wife over the said property or to prevent my said wife from selling or disposing of the same, or mortgaging the same or from using and enjoying the same or the proceeds thereof."

Mrs. Selig, also now deceased, survived her husband, and by will devised the property received from him; her power so to do being the sole question for decision presented to us by this record.

Taking the will by its four corners and construing it as a whole, it is clear that the testator did not mean

to vest his wife with power to dispose of the property by will, but that what he did mean is simply this: That his wife should have the use and enjoyment of the property during her lifetime, with full power to mortgage or sell it, and that in event it, or any portion thereof, should not be sold by her, it should be divided after her death equally among his children.

There are cases cited by counsel for appellee which uphold their contention that by the first clause of this will Mrs. Selig was vested with an estate in fee simple, and that the limitation over after her death to the children of the testator is void. These cases, however, proceed upon the mistaken theory that the two clauses of the will can be construed separately and by ignoring the whole doctrine of executory devises. The will must be construed as a whole, but, if it were permissible to construe the two clauses of it separately, and by so doing to hold the first to be a devise in fee, the limitation over contained in the second clause would be valid as an executory devise. 2 Black. Comm. star p. 173; 2 Jarman on Wills, p. 1432.

The court below having upheld the will of Mrs. Selig, its decree will be reversed, and the cause remanded.

Reversed and remanded.

HARRISON ET AL v. GARNER.

[70 South. 700.]

TRIAL. *Instructions. Ignoring defenses. Extending time of payment. Surety. Release.*

An agreement by the payee of a note to extend for a definite period the time of payment, in consideration of the promise of the principal debtor to pay interest on the debt during such extension, constitutes a binding contract of forbearance, and

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will operate to discharge a surety who does not consent to the extension, and an instruction which eliminates from the consideration of the jury such defense by the surety should not be given.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by I. Garner against S. D. Harrison and others. From a judgment for plaintiff, defendants appeal.

Appellee, complainant in the court below, filed suit on a promissory note for three hundred dollars with interest and attorney's fees, against appellants, S. D. Harrison, Ed Ware, and Dr. L. E. Robinson. The defendants pleaded the general issue, and the defendants Robinson and Ware gave notice that they would show that they were sureties only, and that the holder of the note at the request of Harrison, the principal, had extended the note for a valuable consideration without their knowledge or consent, thereby releasing the sureties. Defendant Harrison pleaded payment to the extent of one hundred dollars principal and forty dollars interest. On the trial defendants Ware and Robinson offered testimony in support of their plea and requested a peremptory instruction as to their liability, which was refused. At a request of plaintiff the court gave the following instructions:

"The court instructs the jury, for the plaintiff, that they must find for the plaintiff in the sum of two hundred dollars and ten per cent. interest on the same from November, 1912; and the court further charges the jury, for the plaintiff, that unless they believe from the evidence that defendant paid the plaintiff the sum of one hundred dollars principal and interest up to November, 1912, it is their duty to find for the plaintiff in the full amount sued for, to wit, three hundred dollars with interest at ten per cent. per annum from November 1, 1912, to this date, and thirty dollars attorney's fee, or a total of three hundred and eighty-five dollars."

The jury returned the verdict for three hundred and eighty-five dollars, and judgment for that amount was rendered jointly against all three defendants, and they appeal.

John P. Edwards, for appellants.

An agreement by the holder of a note to extend for a definite period the time of payment, in consideration of the promise of the principal debtor to pay interest on the debt during such extension, constitutes a binding contract of forbearance, and will operate to discharge the sureties who do not agree to the extension. *Moore v. Redding*, 69 Miss. 841.

Both of the other defendants as well and S. D. Harrison testify that the plaintiff did not ever obtain the consent of said sureties to have the time of the payment of this note extended, neither did Harrison ever obtain the consent of said sureties or mention such a thing to them. The sureties did not know but that the note had been paid, and both testify that Harrison was solvent at the maturity of the note, and that after the extension of the time for the payment had been made time after time, from year to year that Harrison finally became a bankrupt. Then in view of the evidence as above cited and the authority thereon as above shown, we most seriously contend that the court committed very grave error in granting the above quoted instruction, and which is a peremptory instruction on every issue raised by the pleadings except the issue of payment of only one hundred dollars. It certainly cannot be disputed that the testimony of plaintiff and that of the defendant Harrison tends to support the issue in favor of defendants as to the extension of the time of payment of the note, and this being true the peremptory instruction should not have been granted. See *Strauss v. National Parlor & Furniture Co.*, 24 So. 703, 76 M. P. 343.

W. M. Edwards, for appellee.

In order to discharge a surety, there must be a binding contract between the creditor and the principal, founded on a valuable consideration, by which the creditor is precluded from suing upon the contract, and also the principal debtor must be precluded from the right to pay the indebtedness at any time. *Keirn v. Andrews*, 59 Miss. 39. There is no evidence in the record in this case that even tends to show that there was an agreement between the holder of the note and the said S. D. Harrison whereby the payment of the note was to be extended for a definite time; but on the other hand the evidence, we submit, shows most conclusively that there was only a mere indulgence of the debtor by the creditor.

Moore v. Redding, 69 Miss. 841, relied on by opposite counsel is not applicable here. There the creditor had a distinct agreement with the debtor for a valuable consideration and for a definite time for the extension of the payment of the indebtedness. There the indorsements were written on the back of the note expressing the amount of interest paid, and that the payment of the note was extended for a definite time.

Part payment of a debt due and a promise to pay the balance, and to continue paying the same interest, is no change of the original contract. The creditor's hands are not tied by the debtor's promise to perform his legal obligations.

SMITH, C. J., delivered the opinion of the court.

According to the testimony of appellants, the time for the payment of the note sued on was several times extended one year upon his agreement to pay interest thereon. The case, therefore, is ruled by *Moore v. Redding*, 69 Miss. 846, 13 So. 849, and the instruction which eliminated from the consideration of the jury the defense of the sureties that they had been discharged by these extensions should not have been given.

Reversed and remanded.

JONES v. KNOTTS.

[70 South. 701.]

TRIAL. *Direction of verdict. When proper.*

Where plaintiff proved a good cause of action by the testimony he offered and there was a conflict in the evidence offered by the plaintiff and defendant, the cause should have gone to the jury, and the trial judge was in error in granting a peremptory instruction for the defendant.

APPEAL from the circuit court of Jasper county.

HON. W. H. HUGHES, Judge.

Suit by L. J. Jones against H. J. Knotts and others. From a judgment on peremptory instruction for defendants, plaintiff appeals.

Plaintiff brought suit in the circuit court against defendants for damages alleged to have been done to his land by surface water diverted onto it from the land of defendants by a ditch dug by defendants. After the testimony was in, the court gave a peremptory instruction for defendants.

H. L. Austin and J. C. Ward, for appellant.

Thigpen & Huddleston, for appellee.

HOLDEN, J., delivered the opinion of the court.

The plaintiff in the court below proved a good cause of action by the testimony he offered, and, as there was a conflict in the evidence offered by the plaintiff and the defendants below, the cause should have gone to the jury, and the trial judge erred in granting a peremptory instruction for the appellees.

Therefore the case is reversed.

Reversed and remanded.

W. M. CARTER LUMBER Co. ET AL v. DEOPP.

[70 South. 701.]

MECHANICS' LIENS. Enforcement. Equitable jurisdiction.

Since the aggregate amount which an owner employing a contractor to make repairs on a building can be called on to pay various materialmen, can only be ascertained after an accounting between him and the contractor, where the various materialmen bring actions at law to enforce this lien, the owner may sue in equity to compel the materialmen to propound their claims in the chancery court; the stating of the account between the owner and the contractor being a proper function of equity.

APPEAL from the chancery court of Jones county.

HON. SAM WHITMAN, Jr., Chancellor.

Suit by L. E. Deopp against the W. M. Carter Lumber Company and others. From a decree overruling a demurrer to the bill, defendants appeal.

Appellee, the owner of a building, contracted with one Russell to make repairs on same. Appellants furnished Russell with the material used in the performance of the contract, and, not receiving payment for the material from Russell, they instituted their several separate suits against appellee setting up a materialman's lien. Thereupon appellee filed his bill in chancery against the appellants, and also against Russell, the contractor, to restrain them from prosecuting further their suits in the courts of law, alleging that the prosecution of the several suits would unnecessarily harass him, and that the appellants be required to propound their claims in the chancery court, and prayed an accounting with Russell. Appellants demurred to the bill, the demurrer was overruled, and an appeal granted.

Halsell & Welsh, for appellants.

SMITH, C. J., delivered the opinion of the court.

Since the aggregate amount which appellee can be called upon to pay the various materialmen, joined as

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parties defendant hereto, can be ascertained only after an accounting between him and Russell, the principal defendant, the stating of which account is a proper function of a court of equity, the demurrer to the bill was properly overruled.

Affirmed and remanded, with leave to appellants to answer within thirty days after the filing of the mandate in the court below.

Affirmed and remanded.

HARRISON COUNTY v. MARIONE.

[70 South. 702.]

1. COUNTIES. *Board of supervisors. Unauthorized act. Liability. Pleading. Demurrer. Admission.*

When the board of supervisors of a county entered an order requiring all live stock in the county to be vaccinated and appointed a person to vaccinate such stock, who over plaintiff's protest vaccinated a horse, which in consequence contracted lockjaw and died, in such case the county was not liable for such death, since the board of supervisors acted without authority and a county is not liable for the unauthorized acts of its board of supervisors.

2. PLEADING. *Demurrer. Admission.*

On demurrer the court will assume that the declaration states the facts.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by S. Marione against Harrison County. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. G. Evans, T. M. Evans and R. C. Collins, for appellant.

The county is not liable for the acts and negligence of its officers and agents. 4 Am. and Eng. Ency. (1 Ed.), page 367. A county is not liable to one whose property is damaged by the acts and negligence and tortious acts of a road overseer. *Raney v. Hines County*, 79 Miss. 238; *Sutton v. Carroll County*, 41 Miss. 236; *Braham v. Hines County*, 54 Miss. 363. These cases support the doctrine announded in 79 Miss. 238.

In the case of *Raney v. Hines County*, 78 Miss. 308, demurrer to the declaration was overruled and the case remanded. In this case the declaration alleged that the county had damaged property belonging to plaintiff for public use without compensation. On the trial of this case, on the merits, there was a judgment for the defendant county, and an appeal was taken and affirmed as appears in same case referred to in 78 Mississippi (*Raney v. Hines County*, 79 Miss. 238.)

In the case at bar, the declaration sets out the facts substantially. A disease called Anthrax appeared in the county and the board of supervisors acting under the advice of the State Live Stock Sanitary Board, in order to protect the public health against the use of meats that might be so diseased, made an order that all live stock be vaccinated and made other precautionary orders, and under the acts of the legislature of 1910, page 135, appropriated money to pay the expense of inspectors.

As shown by the declaration and order of the board one Hollis Taylor was appointed as one authorized to vaccinate live stock and did vaccinate the horse over which this controversy arose. It therefore appears that Taylor was the agent and officer of the county delegated to perform the duty.

We submit that nothing in this record shows any liability on the part of the county to pay for the horse so vaccinated, and we further submit that there is no law

authorizing the board of supervisors to pay for the horse in question out of any fund in the county. And as to non-liability of the county, see "Cyc." Vol. 11, page 498; 5 Thompson on Negligence, page 5822; 58 Am. St. Rep., 396; 82 Am. Dec., 63; 64 Am. St. Rep. 428.

We submit therefore that the court erred in overruling the demurrer filed by the county and rendering judgment against the county.

George H. Ethridge, assistant attorney-general, for the state.

I have not been advised as to the view of the learned court below in holding that the county is liable on the facts stated in the declarations set forth. It is well settled by all the authorities that I have been able to find touching on the question, that the state may in protecting the health of the public under its police power, kill or destroy stock infected or exposed to contagious diseases that would impair the public health and may do this without paying for the cattle or other property destroyed.

It was held in the case of *New Orleans v. Charouleau*, 18 L. R. A. (N. S.), 368; 121 L. Ed., 890; 46 So. 911, that diseased cows might be destroyed without paying the owner for them as a police regulation. See also the authorities in note to the above case in the L. R. A.; also: *Houston v. State*, 98 Wis. 48; 42 L. R. A. 39; 74 N. W. 111.

In these cases the right to destroy these animals without compensation was upheld. See also: 28 Am. Rpts. 352.

In the case of *Ross v. Denshaw Levee Board*, 83 Ark. 176, 21 L. R. A. (N. S.), 699, 103 S. W. 380, a statute of Arkansas permitting the killing of hogs running at large on or near public levees without compensation to owners was upheld by the supreme court of that state under the police powers of the state.

On the question of the power of the state to require vaccination to prevent the spread of dangerous diseases, see the following authorities: *People ex rel. Jenkins v. Board of Education*, 17 L. R. A. (N. S.), 709; 234 Ill. 422; 84 N. E. 1046; *Com. v. Jacobson*, 183 Mass. 242; 66 L. R. A. 935; 66 N. E. 719, affirmed in 197 U. S. 11; 49 Law Ed. 643; *Norris v. Columbus*, 102 Ga. 792; 42 L. R. A. 175; 66 Am. St. Rep. 243; *State v. Hay*, 126 N. C. 999; 49 L. R. A. 588; 78 Am. State Rep. 691.

In the light of these authorities, I respectfully submit that the county is not liable and that the learned court below erred in holding the county liable, and that the case should be reversed and dismissed.

Rucks Yerger, for appellee.

The rule that a county cannot be held liable for the wilfull or tortious or negligent acts of its agents is subject to exceptions, and that cases can arise when a county is liable, is shown by the decisions of the court in this state.

The question of the liability of a county to individuals who have suffered damages has arisen several times in the state. The first case that I have seen and one that is relied on in the brief of counsel for appellant is *Sutton v. Carroll County*, 41 Miss. 236.

The view that there are cases in which the county can be held liable for the acts of the board of supervisors is supported by the cases of *Raney v. Hines County*, 78 Miss. 308.

It has been held that a county is not liable to suit for the acts of such agents, but the wanton wrong here alleged to have been inflicted upon the plaintiff is also alleged to have been committed by the county. The board of supervisors represent the county. *Board v. Niles*, 58 Miss. 48; *State v. Fortenberry*, 54 Miss. 316." This case was again before the court in 79 Miss. 238. A judgment

in favor of the county was affirmed because it was shown that there was an overseer and the neglect was his. This case clearly shows the distinction between acts done by the board and by a road overseer.

This same view is taken by the court in the case of *State v. Vaughn*, 77 Miss. 681. In this case plaintiff sued on the bond of a member of the board. A decision was sustained because the declaration did not aver that there was a failure to appoint an overseer. The appellee, therefore, contends that there are cases where a county can be made to pay damages for the tortious and wrongful acts of their representatives and that the case at bar is such a case and that this view is supported by the above decisions.

Can a county be made to pay for admitted injury, such as this, for the court will note that death of the horse from tetanus caused from the vaccination, is admitted? Can a county inflict this character of injury on a party without compensation being made?

The duty of vaccinating stock is not a duty imposed by law, on the county, it is one voluntarily assumed, and was specially authorized and in such cases the county is liable.

The general rule laid down by Cyc. in Vol. 11, page 498, see D, is that a county is "not considered liable to persons injured by the wrongful negligence of duty, or the wrongful acts of their officers, agents or employees done in the course of the performance of corporate powers or in the execution of corporate duties unless authorized or ratified by them."

The act complained of here was wrongful and was specially authorized and directed. The exception to the rule is when the act complained of was authorized or ratified. In support of the exception see *Schussler v. Hennepin County*, 67 Mo. 412, 39 L. R. A. 75. Also *Coburn v. San Mateo County*, 75 Fed. (Cal.) 523. Another exception to the general rule is set out in 11 Cyc, page 500, sec. 2, is when the duty is not one imposed by law, but is one

voluntarily assumed. This exception is supported by the cases of *Hanna v. St. Louis County*, 62 Mo. 313; *Lefeois v. Monroe County*, 24 N. Y. App. Div. 421, 48 N. Y. Sup. 519.

As hereinbefore stated the duty to vaccinate stock is not a duty imposed by law on the board, but is one this board voluntarily assumes.

Cook, J., delivered the opinion of the court.

The declaration in this case avers that the board of supervisors of Harrison county, on July 7, 1913, entered an order, or ordinance, requiring all of the live stock in the county to be vaccinated, and appointed one Hollis Taylor as a suitable person to vaccinate the stock in one of the supervisor's districts of the county; that said Taylor, in pursuance of said ordinance and over the protest of plaintiff, vaccinated a horse, the property of plaintiff; and that the horse contracted lockjaw as a result of said vaccination and died. Therefore plaintiff demanded and obtained a judgment against Harrison county for the value of the horse.

The defendant, Harrison county, demurred to the declaration, on the ground that the board of supervisors was without power to pass the ordinance, and the county was not liable for the *ultra vires* acts of the board. The demurrer was overruled, and, defendant declining to plead further, a judgment was entered against the county for one hundred and eighty-five dollars, the value of the horse, from which judgment this appeal was prosecuted.

We have been unable to find any statute conferring upon boards of supervisors the power assumed by the board of supervisors in the present case. Appellee, plaintiff below, says in his brief that the board usurped the power, and its order was void, and that the vaccination of the horse was a trespass, and a reckless invasion of plaintiff's property rights. This indictment of the members of the board seems to be justified, if the averments of the declaration are true.

Brief for appellant.

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Granting, as we must, that the declaration states the facts, we are nevertheless of the opinion that plaintiff has not stated a cause of action against the county. The county is in no wise liable for the unauthorized acts of the board of supervisors.

Reversed, and cause dismissed.

DELANCEY v. BYRD.

[70 South. 702.]

SEDUCTION. Right of parents. Action for damages. Bar by bastardy. Proceeding.

A proceeding against a defendant for bastardy under Code 1906, chapter 15, which was settled by the payment of two hundred dollars to the prosecutrix did not bar an action by her father for damages for her seduction.

APPEAL from the circuit court of Harrison county.

HON. J. I. BALLINGER, Judge.

Suit by N. C. Delancey against J. W. Byrd. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Logan Scarborough and R. C. Cowan, for appellant.

The court erred in sustaining said motion because plaintiff's right of action was based upon not only the loss of services and disgrace and shame that was brought upon his seduced daughter, but it was also based upon damages done to the family name and to his other minor children and we contend that the right of this plaintiff to sue for the seduction of his minor daughter could not be delegated and was not delegated to the minor daugh-

ter by section 719 of the Mississippi Code of 1906. In the case of *Ellington v. Ellington*, 47 Miss. 329, the court said: For the seduction and defilement of a minor daughter, the parent may recover for the wrong, because it is his right and duty to protect the person and the morals of his child, and so long as disability of non-age continues, he has *de jure*, the authority to control its person and conduct its society and services.

This is an action in reality to punish the seducer in damages, for the dishonor and disgrace which the outrage brings upon the parent and the rest of the family and to delegate this to a minor daughter who did not understand that she had such a right would be taking away from the parent that right and obligation, which is given him by the laws of society and of the country. We quote from the opinion of the court on page 351 and 352 of the 47th Miss., 329, *Ellington v. Ellington*:

“The true relation of parent and child, is that of protection, nurture and education, on the one side, and dependence, filial affection and obedience on the other. The ties of nature are generally sufficient to enforce these duties. Control over the child, so as to dispose of its time, and labor, and person is necessary in order that the parent may so train and guide his offspring, as that it may be a virtue and (according to circumstances) a useful and intelligent member of society. The family is the oldest institution among men; out of the aggregation of these lesser communities, the state and the nation is made up; whatever tarnishes the purity and honor of the female member, whilst entailing disgrace and suffering upon the family also in its effect is a public wrong. That system of jurisprudence which punishes in damages the slightest aggression upon property, but denies redress to the father, and if he be dead, to the mother, for the defilement of an infant daughter ‘except upon the predicate of a loss of services,’ is at variance with the sentiments and conscience of this age. So clamorously

has the injury inflicted upon the parental feelings, and the disgrace attached to the female, and reflected from her upon the family, pressed upon the judicial mind as a substantial injury for redress, that the court have, in case after case, so frittered away the technical gravaman of the action, that but little more now remains except the barren form. The remarks of an eminent judge are true, 'That this relation of master and servant is but a figment of the law to open the door for the redress of the real injury;' 'the parent comes into court as a master, he goes before the jury as a father.' "I have quoted considerable parts of the case just cited, which leads me to believe that it has at least some bearing on the case at bar and after summing up all of the records of this case, I firmly believe that the appellant made out a *prima-facie* case and sufficient to recover from the appellee, and in view of the decision in the case of *Mc-Caughn v. Young*, I therefore insist that the court below erred in the ruling herein and respectfully submit the same.

Mize & Mize for appellee.

Under section 720 of the Code of 1906, when the daughter settled her claim against Byrd, that was a settlement in full of any claim by her father as the section above cited is that a recovery by the daughter is a bar to an action by her father, and the lower court could do nothing else than give the peremptory instruction. There was an agreed judgment for one hundred dollars in the bastardy case which judgment was entered up by the justice of the peace and which was settled as shown by the record, and then there was an agreed amount of two hundred dollars in the seduction cause which was paid by Byrd as shown by the record.

We therefore respectfully submit that the action of the court was correct and should be affirmed.

Cook, J., delivered the opinion of the court.

This is an action begun by appellant, the father of Alice Delancey, a minor, to recover from appellee damages for the seduction of his minor daughter. To this action appellee interposed the plea of "not guilty," and a special plea of accord and satisfaction. The record discloses that Alice Delancey had instituted bastardy proceedings against appellee, under chapter 15, Code of 1906, and that this suit was settled by paying to Alice two hundred dollars and this settlement was pleaded in bar of the present action. The trial court after hearing all of the evidence, directed the jury to return a verdict for defendant, which was done, and from this judgment of the court, plaintiff appeals.

The seduction was clearly established by plaintiff's evidence, and we assume that the trial court gave the peremptory instruction for defendant, because it was shown that the bastardy suit had been settled to the satisfaction of Alice, and this settlement was a bar to the present suit. We are of opinion that the bastardy proceedings were entirely different from and independent of the damages to the father of Alice, and a settlement in that case cannot serve as a bar to the present action. The right of the father to sue for damages for the defilement of his infant daughter is independent of the statutory remedy provided by chapter 15, Code of 1906.

"If the daughter be defiled by the person in whose family she resides as a member, or to whom she may be hired for wages, such person will be amenable in damages, on the idea of being a tort-feasor, from the perpetration of the injury, or because the wrongdoer shall not be permitted to plead that which was intended to be for the good of the child, as a justification for her ruin. In the case of a minor daughter, it is not necessary to prove a loss of service, or expense incurred. The father or mother (if he be dead), may stand upon the 'parental right to command them.' The value of the society or

services of a daughter consists very much in the innocence and purity of her person and character, and are greatly depreciated in consequence of her defilement, which not unfrequently occasions their total loss." *Ellington v. Ellington*, 47 Miss. 329.

Reversed and remanded.

INDIANOLA COMPRESS & STORAGE CO. ET AL. v. SOUTHERN
RY. CO. IN MISSISSIPPI.

[70 South. 703.]

1. **APPEAL AND ERROR. Questions. Reviewable. Questions raised in trial court. Jurisdiction. Estoppel.**

Where a cause, is not one strictly of equity cognizance, but still under section 147 of our Constitution, it was within the power of the court below to hear and determine it. In such case the question of jurisdiction, in order to be availed of in the supreme court should have been distinctly raised and insisted on in the court below.

2. **APPEAL AND ERROR. Jurisdiction. Estoppel.**

Where defendants in the chancery court not only did not insist on an objection to the jurisdiction of the court, but by filing cross-bill themselves submitted the whole matter in controversy to the court for adjudication, they were thereby on appeal estopped from questioning its power so to do.

APPEAL from the chancery court of Sunflower county.

HON. E. N. THOMAS, Chancellor.

Suit by the Southern Railway Company in Mississippi against the Indianola Compress & Storage Company and others. From a decree for complainant, defendant appeals.

This suit was begun by a bill of chancery by the appellee to enjoin the appellants from prosecuting suits

at law against appellee. The bill alleges that the Indianola Compress & Storage Company, which had been destroyed by fire nearly a year previously, had instituted a suit in the circuit court, in which it was claimed that the fire originated through the negligence of the appellee or its servants, and judgment was asked for the damages sustained. The bill alleged that there were a large number of insurance companies and a large number of individuals whose property had been destroyed in the fire, who were asserting claims against the complainant. It alleged that three of these individuals had instituted three separate suits at law against appellee upon the same grounds, and that the claims of all the defendants were based upon the same state of facts, and that the insurance policies covering the property destroyed in the fire contained clauses of subrogation in favor of the companies for whatever they might be compelled to pay because of the destruction of property covered by the policy. The bill alleged that it was claimed by the defendants that the complainant had constructed a spur track leading around the compress building, and had caused certain cars, occupied by employees, to be set out on said track, and allowed same to remain there for several days, and to be used as camp cars, in which a few workmen lived, and that, through the carelessness and negligence of these employees of the complainant, the fire had originated, which ignited dry grass and spread to the lot belonging to the compress company and ignited the cotton stored there, as a result of which the property was destroyed by fire. The bill alleged that the claim of the defendants that the fire originated through the negligence or fault of the complainant is not true, but that the fire originated some distance from the cars of the complainant, and not through its fault, or that of its servants, but on property not belonging to it, and through sources over which it had no control. The bill alleges that, aside from the suits filed by four of the defendants, other defendants were threatening suit, and

that the insurance companies were instigating the other defendants in bringing suits against complainant. The bill alleged that the claims were based on the same state of facts and the same principles of law applied, and that complainant had a valid defense to all of them, and that if all these actions at law were separately tried it would be harassed by a multiplicity of suits and subjected to the greatest annoyance and expense, all of which could be obviated by the trial of a single suit in chancery. The bill prayed for an injunction against these defendants, who had already begun suit, and that the other defendants be restrained from instituting suits against it.

The defendants answered, admitting the filing of suits by certain of them, and denying that any suits had been brought at the instigation of the insurance companies. They admitted that the complainant's spur track ran near the compress, and charged that the fire was started by the negligence of a cook in the service of the company throwing coals of fire upon the right of way, which ignited the dry grass and spread the flame to the compress. The answer denied that the complainant would be harassed or subject to hardship. The answer was made a cross-bill, which prayed for the amount of damages claimed to have been sustained, and the amounts which the insurance companies had been compelled to pay, and prayed for a decree against the complainant for the amount thereof for the negligent destruction of the property. The case was heard on the pleadings and evidence, and resulted in a decree in favor of the complainants, and the defendants appeal.

On appeal one assignment of error questions the jurisdiction of the chancery court.

McLaurin & Arminstead, Harris Dickson and Gwin & Moulger, for appellant.

Catchings & Catchings, for appellee.

SMITH, C. J., delivered the opinion of the court.

Assuming for the sake of argument that this cause is not strictly one of equity cognizance, still, under section 147 of our Constitution, it was within the power of the court below to hear and determine it, as pointed out in *Hawkins, Trustee, v. Scottish Union & National Insurance Co.*, 69 So. 710. This being true, the question of jurisdiction, in order to be availed of here, should have been distinctly raised and insisted upon in the court below.

Conceding, for the sake of the argument, that the allegation in the answer that the "defendants deny that the complainant herein will be subject to great wrong and hardship, or be harassed beyond the legal procedure necessary to establish and collect the fair and proper demands of defendants," was intended as an objection to the jurisdiction of the court, the objection was not only not insisted upon, but by filing cross-bills appellants themselves submitted the whole matter here in controversy to the court for adjudication; consequently, they are now estopped from questioning its power so to do.

On the merits, it will be sufficient to say the decree of the court below was rendered upon conflicting evidence, and therefore is not open to review here.

Affirmed.

CROOM v. WILLIAMS ET AL.

[70 South. 704.]

EXECUTION. *Claims by third person. Venue. Statutory provisions.*

The provisions of Code 1906, section 4998, that the venue of the trial of a claimant's issue may be changed on claimant's applications to the county of his residence, makes it optional with

the claimant as to whether or not the claimant's issue will be tried in the county from which the execution is issued, or the county in which the property levied upon is situated and the claimant lives, and in such case if the claimant applies for a change of venue to the county in which he lives and the property is situated, the statute is mandatory and the change of venue must be granted.

APPEAL from the circuit court of Greene county.

HON. J. A. BUCKLEY, Judge.

Consolidated actions by Mrs. Lillian Croom against D. R. Williams and others, to try right to property levied on under executions. From a judgment denying relief to Mrs. Lillian Crooms, she appeals.

The facts are fully stated in the opinion of the court.

Ford & White and *O. F. Moss*, for appellant.

Baskin & Wilbourn, for appellee.

POTTER, J., delivered the opinion of the court.

This is an appeal from the circuit court of Greene county by Mrs. Lillian Croom from a judgment against her on the trial of a claimant's issue by that court in two cases which were consolidated and tried together, as they presented the same question of law and fact. The first appearance of the claimant in this case in the circuit court of Greene county contained an application for the removal of the case to George county, as provided in section 4998 of the Code of 1906. In her motion for a change of venue of the cause to George county, the claimant set out that she—

“is now, and was at the time of the issuance of the execution in said cause, a *bona fide* resident of the county of George, state of Mississippi, and that the property levied upon in said cause was at the time of the levy of said writ, and still is, in said county of George.”

The facts upon which her motion was based were not controverted. Nevertheless the court refused to grant

the change of venue sought. This was error. The claimant, under the provisions of the above section, had the statutory right to a change of venue to the county where she lived and the property levied upon was situated. The provisions of the statute that the venue of the trial of a claimant's issue may be changed on claimant's application to the county of his residence makes it optional with the claimant as to whether or not the claimant's issue will be tried in the county from which the execution is issued, or the county in which the property levied on is situated and the claimant lives. The statute is mandatory, and when application is made for a change of venue upon the facts stated in this motion, the claimant is entitled to the change.

For error in refusing the change of venue to George county on claimant's motion, this cause is reversed and remanded.

Reversed and remanded.

RICE ET AL. v. ROBINSON LUMBER CO. ET AL.

[70 South. 817.]

1. LOGS AND LOGGING. *Grant of timber right. Construction. Appeal and error. Review. Findings.*

Where a deed after conveying the pine timber on the land, further provides: "For the consideration we hereby also sell and convey to the said lumber company a right of way over, through, and across the said land for the purpose of building, maintaining and operating logging roads, dirt roads, tramroads and dummy roads for the purpose of moving said timber. For the same consideration, we likewise convey and grant to the said lumber company a right of ingress and egress to go upon and over said land for the purpose of removing the said tim-

ber at any and all times from the date hereof not to exceed, however, eight years from the date of this deed." Such a deed did not authorize the grantee to build a logging road across the land for the purpose of hauling timber from other land.

2. APPEAL AND ERROR. *Review. Findings.*

The findings of a chancellor, in a suit to enjoin an action for damages from the maintenance of a logging road, that the owner of land was not damaged is not conclusive, on appeal, since the owner of the land is entitled to compensation for the use of the right of way over the land in addition to damages done in digging the ditches through his lands, fields and crops.

APPEAL from the chancery court of Amite county.

HON. R. W. CUTLER, Chancellor.

Suit by W. L. Robinson Lumber Company against M. O. Rice and others. From a decree for complainants, defendants appeal.

The facts are fully stated in the opinion of the court.

Geo. Butler and C. T. Gordon, for appellant.

R. S. Stewart and J. T. Lowery, for appellee.

HOLDEN, J., delivered the opinion of the court.

In June, 1910, the W. L. Robinson Lumber Company, appellee here and complainant in the chancery court below, purchased from M. O. Rice *et al.*, appellants here and defendants in the court below, all of the pine timber and merchantable pine trees on two hundred and forty acres of land in Amite county. Appellants executed and delivered to appellees a deed, which reads as follows:

"For and in consideration of the sum of two hundred and sixty-two dollars and fifty cents cash in hand to us paid, the receipt whereof is hereby acknowledged, we hereby sell, warrant and convey unto the W. L. Robinson Lumber Company, all the pine timber and merchantable pine trees, lying, standing, and growing upon the following land, lying and being in the county of Amite, state of Mississippi, to wit: South half of the north-west quar-

ter, west half, of the south-east quarter and the south-west quarter of the north-east quarter and the north-east quarter of the south-west quarter being the same land belonging to the R. J. Rice estate. For the consideration we hereby also sell and convey to the said lumber company, a right of way over, through, and across the said land for the purpose of building, maintaining and operating logging roads, dirt roads, tramroads, dummy roads for the purpose of moving said timber. For the same consideration we likewise convey and grant to the said Robinson Lumber Company a right of ingress and egress to go upon and over said land for the purpose of removing the said timber at any and all times from the date hereof, not to exceed however, eight years from the date of this deed."

All of the timber purchased by the lumber company was situated on the west side of this tract of land, and the lumber company acquired and owned other timber north of this land and through which timber it had constructed a spur for its logging railroad. During the fall of 1910 the lumber company cut and removed practically all of the timber off of the appellant Rice's land, hauling it to the said spur track upon which it was transported west to its mill at Gloster, Miss. Afterwards, the lumber company, having acquired other timber east of the Rice land, entered upon the property purchased from appellants, and constructed a logging railroad extending from the west side to the east side of this tract of land, passing through three forty acre tracts, and through the main body of the cultivated land of appellants, but through none of the timber purchased from appellants on the said land. In constructing this logging railroad, the lumber company dug trenches through the fields, injuring the crops, and otherwise damaging and impairing the usefulness of the land. The lumber company used this logging railroad as its main line over appellant's land for the purpose of hauling timber from the lands east of the Rice tract, where it had other large timber holdings, but did not use it for the pur-

pose of removing the timber from the Rice land as provided in the deed. Some time after the lumber company had been operating its main logging railroad over the land of appellants, and hauling the timber, not from the Rice land, but from the lands owned by the lumber Company east of the Rice lands, the appellant, believing that they had a cause of action for trespass and damages, filed a suit in the circuit court, seeking to recover damages against the appellee lumber company. Whereupon the lumber company sued out a writ of injunction in the chancery court, alleging in its bill that there was an error in the description of the land in the deed, conveying the said timber from Rice to the lumber company, and asking its correction, and to restrain appellants in the circuit court case. At the hearing of the bill by the chancellor the error in the deed was corrected so as to properly describe the land upon which the timber sold by Rice to the lumber company was located, and the deed appears here in its corrected form. The chancellor further decreed that the injunction be made perpetual, forbidding the appellants proceeding further in the case at law. From the decree of the chancery court this appeal is taken.

We find no trouble here in construing the deed, as it is plain and unambiguous in its terms. The intention of the parties is easily ascertained by a careful perusal of the instrument. After conveying the pine timber on the land, the deed further provides that:

“For the consideration we hereby also sell and convey to said lumber company a right of way over, through, and across the said land for the purpose of building, maintaining, and operating logging roads, dirt roads, tramroads, dummy roads for the purpose of moving said timber. For the same consideration we likewise convey and grant to the said Robinson Lumber Company a right of ingress and egress to go upon and over said land for the purpose of removing the said timber at any and all times from the

date hereof not to exceed, however, eight years from the date of this deed."

It will be observed that the latter clauses of the deed limit the use to the operation of a logging railroad over the land by the lumber company for the purpose (only) of removing the pine timber and merchantable pine trees thereon, and that the grant of the easement was not for the purpose of using it as a logging railroad by which the lumber company might reach its other timber holdings east of this Rice tract of land, and haul its timber from there on its logging railroad over and across the Rice land west to its mill at Gloster for a period of eight years.

"If a certain use is plainly and exclusively within the language of a grant, the purpose as expressed will be effectuated without looking to any extrinsic circumstances to determine the intention of the parties." *Wilczinski v. Railroad Co.*, 66 Miss. 595, 6 So. 709; 14 Cyc. 1201, 1206; 10 Am. & Eng. 428 and notes; 23 Am. & Eng. 24.

The whole testimony in this case shows that the appellee lumber company exceeded the terms of the grant in the deed by using the right of way for another and different purpose than that contemplated and intended by the parties to the deed. It appears from this record that the lumber company made very little pretense of using this logging railroad for the purpose of hauling timber from the Rice land, as practically all of this timber had been previously removed over the spur track north of it.

It seems to be the contention of the lumber company, appellee here, that this deed grants a use of the land for any and all purposes of a logging railroad for a period of eight years. This contention is untenable under the terms of the deed. The lumber company had eight years in which to commence and remove the timber, on the Rice land, but nothing more. And in no view of the case would the lumber company be warranted in occupying the land, under this deed, with its main line of logging railroad for the purpose not of removing the timber that it pur-

chased from appellant, but for the purpose of hauling the timber from other lands acquired by it east of the Rice land.

The lumber company, through its counsel, urges here that the decree of the chancellor is conclusive, inasmuch as the chancellor passed upon the facts in the case and found that the appellants were not damaged by the lumber company's construction and use of its line of logging railroad across the Rice land. We cannot, for several reasons, agree that this position is sound. Aside from the damage done by the lumber company in digging the ditches through the land, fields and crops of the appellants, we think that the appellants would be entitled to compensation for the use of the right of way over the land, if used for purposes other than those granted by the deed. We find no error of the chancellor in correcting the description in the deed, and this portion of the decree of the court below is affirmed, but he erred in legally construing the deed, and so the remaining part of the decree is reversed, the injunction dissolved, and the cause remanded.

Reversed.

CONGREGATION OF SISTERS OF PERPETUAL ADORATION v. JANE.

[70 South. 818.]

1. COVENANTS. *Covenant against incumbrances. Breach. Liability.*
General covenants.

Where a vendor sold land for a valuable consideration by a general warranty deed, the granting clause of which was "do hereby sell, convey and warrant" and further provided, "to have and to hold the same free from and against the legal claims of all persons whomsoever," which land had been previously assessed

for taxes, and which was sold for taxes, and not redeemed within two years, where such tax lien had been unknown to the vendors and where the vendor, having notice of the tax sale in time to redeem, acted upon legal advice and failed to redeem, but in no way misled the vendor. In such case the vendee was entitled to recover of the vendor the consideration paid for the land.

2. COVENANTS. *General covenants.*

The warrantee, in a deed containing a general covenant must deal fairly and in fidelity to his warrantor.

3. COVENANTS. *Breach. Payment of claim by covenantee.*

Where a vendor of land in his deed warranted against the legal claims of all persons, and the land at the time was subject to a paramount tax lien, the vendee might pay the tax or redeem the land from a tax sale and recover from the vendor the amount so paid, and a vendee in such case may buy in an outstanding title or incumbrance to protect his possession, but in so doing he acts at his peril in determining whether the outstanding title or incumbrances is valid, which right, however, is a mere privilege accorded him, and not a duty imposed by law.

APPEAL from the circuit court of Jasper county.

HON. T. H. BARRETT, Judge.

Suit by the Congregation of Sisters of Perpetual Adoration against Edmund J. Jane. From judgment for plaintiff for sufficient amount it appeals.

The facts are fully stated in the opinion of the court.

Denny & Denny and *Wood & Taylor*, for appellant.

Ford & White and *Wells, May & Sanders*, for appellee.

STEVENS, J., delivered the opinion of the court.

Appellant, a religious and educational society, instituted this action as plaintiff in the court below against appellee to recover damages for the alleged breach of a general covenant of warranty, evidenced by a certain deed of conveyance executed by appellee, Jane, to appellant for a certain tract of land in Pascagoula, Miss. The land conveyed belonged on and prior to the 1st day of

February, 1906, to the heirs of one Mary Davis, deceased, and was sold by a commissioner of the chancery court August 29, 1906, and purchased at said sale by appellee. The sale was confirmed in October; a commissioner's deed was executed to appellee October 23, 1906; and on October 24, 1906, appellee conveyed the land to appellants by a general warranty deed, the exact language of the granting clause of which is "do hereby sell, convey, and warrant," and further providing, "to have and to hold the same free from and against the claims of myself, my heirs, assigns, and against the legal claims of all persons whomsoever." The land was assessed in the year 1906 to "Mrs. Mary Davis Est.," and, the taxes being unpaid, the tax collector of Jackson county, on the first Monday in March, 1907, sold and conveyed the land for the delinquent taxes due thereon, one J. E. Lockard becoming the purchaser thereof and receiving a tax collector's deed. The land was not redeemed from this tax sale within the two years allowed. The tax collector's deed was duly delivered, and Mr. Lockard thereafter filed a bill in the chancery court against appellant and Mr. Jane to confirm his tax title. Mr. Jane filed a disclaimer; and the right of Mr. Lockard to confirmation of his title was contested and litigated by appellant, but unsuccessfully. After the chancery court confirmed the tax title, appellant instituted the present action to recover the consideration of one thousand six hundred dollars paid for the land, together with lawful interest. It appears that Mr. Jane bid at the commissioner's sale the sum of one thousand two hundred and forty-one dollars, and accordingly he sold the land at a profit. Possession was surrendered to Mr. Lockard after termination of the chancery suit.

Appellee filed a plea of general issue, and also a special plea setting out the fact that the land at the time of its sale was assessed to the Davis estate, that appellee did not know the taxes were unpaid, and that he did not know the land was sold for taxes until after the sale had ripened into a good title, and further averred that more

than sixty days before the expiration of the period for redemption had expired that notice provided by our statute was served on appellant acquainting it with the tax sale, and thereby giving due warning to redeem, that appellant could have redeemed the land for the sum of fourteen dollars and sixty-five cents, and that appellant failed and refused to redeem, and permitted the land to be sold and the title of appellant thereby defeated by and through appellant's own negligence. There was a demurrer to this plea which was overruled; and thereupon appellant filed a replication denying the material allegations of the plea, and especially denying any bad faith on the part of appellant. Appellee with its special plea tendered the sum of fourteen dollars and sixty-five cents and all costs incurred in this suit as a full measure of his liability. There was an agreed statement of facts, and the cause was submitted to the trial judge without jury; and judgment was rendered by the court, limiting appellant's recovery to the amount tendered, fourteen dollars and sixty-five cents and costs. From this judgment, appellant prosecutes this appeal.

The agreed statement, in addition to the facts above detailed, recites that appellant was required to pay fifty dollars and five cents court costs in defending the Lockard suit, exhibits a copy of the decree rendered by the chancery court confirming the title, and recites that possession of the premises was surrendered to Mr. Lockard under the decree, and that the latter is now recognized as the owner of the land. The agreement has the following additional recitals:

"That sixty days before the 5th day of March, 1906, the date on which said tax title became final by reason of expiration of redemption, that the chancery clerk of Jackson county, Miss., issued a notice in the form prescribed by the statute to the plaintiffs, as the owners of said lands described in said deed, and who were then in possession thereof, of the fact that said lands had been sold for taxes and of the date of expiration of the period

of redemption, which notice was received by plaintiffs; that upon receipt of said notice the plaintiffs went to the courthouse of Jackson county to inquire of the chancery clerk the meaning of the notice and that the clerk suggested that they see some lawyer about the matter; that thereupon the plaintiffs called upon a reputable lawyer in the city of Pascagoula and showed him said notice, and these plaintiffs explained fully to said lawyer the facts and circumstances of the tax sale and of the purchase of the said lands by plaintiffs of said defendant, and said lawyer knowing that the plaintiffs were a religious and charitable society, and on account of such fact their property would not be liable to such taxation, and without knowing and under the belief that said property was the property of said religious society, and was not liable to taxation, the plaintiffs herein then believing and having reason to believe that said attorney was fully informed as to the *status* of title to said lands, their purpose thereof, the purchase thereof by defendant, and as to said tax sale, and said attorney advised the plaintiffs that the tax title was void and they could disregard the notice, and the plaintiffs thereupon acted upon this advice, without notifying the defendant of the fact that said property had been sold for taxes or the fact that they had received said notice, and did not redeem the same from said tax sale, the plaintiffs believing they were under no duty to so inform said defendant herein, and that he knew, or would be advised, of such tax sale and their failure to redeem, the plaintiffs not having undertaken the duty to so inform said defendant, and not intending or seeking thereby to conceal such facts from said defendant or to mislead him in any manner thereby.

“That the defendant, E. J. Jane, did not, in fact, know that the taxes for 1906 were not paid upon said property at the time of his conveyance thereof, and did not know or learn about said tax sale until after the period of redemption from said tax sale had expired, and that plain-

tiff did not know that defendant was ignorant of such facts.

"That plaintiffs gave, as a consideration for said lands in the purchase thereof from said defendant, the sum of one thousand six hundred dollars, and that no part of same has been returned to plaintiffs by the defendant."

Appellee contends that, while the deed contains a covenant against incumbrances, this, if broken at all, is broken when made; that the measure of damages is compensation for losses proximately resulting from the breach; that the covenant against incumbrances is a contract of indemnity and the covenantee is under obligation to protect himself as much as possible against loss and to reduce his damages. To state the contention otherwise, appellee contends that appellant was under duty to pay the taxes, and at least to redeem the land from the tax sale within the two-year period allowed and thereby prevent a sale by the tax collector. Appellant, on the contrary, contends that the covenantee is under no duty or obligation to discharge or pay off the tax lien, but has a right to stand on its covenant; to expect payment of the taxes or the discharge of any tax lien by the covenantor; and to recover on the covenant in the event the covenantor fails to perform his duty in providing against any and all liens whatsoever.

In our judgment, appellant on the pleadings and agreed statement of facts, was entitled to recover. There was a paramount lien upon the land for the taxes for 1906 at the time the deed was executed and delivered. Against this lien appellee voluntarily executed his general covenant, and thereby assumed the burden of defending the title and discharging the paramount lien then existing, whether the existence of the lien was known or unknown to either party. Mere knowledge of this lien on the part of appellant could in no wise operate to shift the burden upon it; and the agreed statement demonstrates conclusively that appellant did nothing to mislead appellee. The pleadings and the agreed statement reflect that ap-

pellant is a religious society, chartered under the laws of Louisiana, and maintains a convent or establishment at Pascagoula, Miss.; that, while members of this society received notice of the tax sale in time to redeem, they promptly made inquiry of the chancery clerk as to the meaning of the notice; that the clerk referred them to a lawyer; that they thereupon consulted a reputable lawyer, who advised them that on account of the fact their society was a religious and charitable society their property was not liable for taxation; and that appellants relied upon this legal advice, and for that reason failed to redeem. It is shown further that appellant did not know whether Mr. Jane had knowledge of this tax sale or not, and, of course, said nothing that induced Mr. Jane to refrain from discharging the lien. Appellant therefore, on the question of good faith, is in the same attitude it would be in had it not received any notice whatever of the sale for taxes until after the period for redemption had expired; and both parties, on the question of good faith, are placed in the attitude they would be in had neither heard anything at all about the tax sale until Mr. Lockard acquired a good and valid title. Aside from any notice which a valid assessment for taxes, advertisement of the regular tax sale for the first Monday in March, 1907, the public records, or the law would impute to Mr. Jane, his contract defines his duty and measures his liability; and it is upon this contract that appellant relies.

For the purposes of this opinion, it may readily be conceded that the warrantee in a deed containing the general covenant "must deal fairly and in fidelity to his warrantor," as said by our court in *Dyer v. Britton*, 53 Miss. 270. It is true also that appellant might have paid the taxes or redeemed the land from tax sale and recovered the amount so paid, as held by this court in *Swinney v. Cockrell*, 86 Miss. 318, 38 So. 353. The vendee may buy in an outstanding title or incumbrance, and thereby protect his possession. In so doing he acts at his peril in judging whether the outstanding title or incumbrance is

valid. This, however, is a mere privilege accorded the vendee, and is not a duty imposed by law. As said by our court in *Kirkpatrick, Adm'x. v. Miller et al.*, 50 Miss. 521:

"He has done what was necessary for his own safety, and what was incumbent primarily on the vendor. If he had waited until a recovery had, then he could have pursued his covenant, and recovered the price paid for the land."

The views expressed by the supreme court of Texas (*Carswell v. Habberzettle*, 99 Tex. 1, 86 S. W. 738, 122 Am. St. Rep. 597) are apposite to the instant case:

"The covenantee in a case like this makes no promise to the covenantor, and owes him no duty. On the other hand, it is the duty of the latter to remove the incumbrance. Therefore, as we think, that if to the debt of the covenantor, which constitutes the incumbrance on the land, there is annexed, either by law or by contract, some condition, by the happening of which the debt may be increased, and the condition happens, the increment is as much a part of the incumbrance as the original debt; and we also think the rule would apply with peculiar force when the happening of the contingency is the result of the covenantor's own default."

The same principle is recognized and enforced in the case of *Wm. Farrell Lumber Co. v. Deshon*, 65 Ark. 103, 44 S. W. 1036. The court in this case, through Wood, J., says:

"Here the covenant against incumbrances was broken by reason of a forfeiture for the nonpayment of taxes which existed at the time of the execution of the deed containing the covenant. Appellant redeemed one of the tracts, but, failing to redeem the other, the title to this became absolute in the state, and, in order to get title to this, it was compelled to purchase from the state, paying the sum of one hundred and fifty-one dollars. Negligence cannot be predicated upon a failure by appellant to redeem from the tax forfeitures. True, it might have done so; but it was under no duty or obligation of that

kind, and its right at law to stand on its covenant, and to recover damages for breach of same, cannot be affected by its failure or refusal to perform a duty which devolved upon another. . . . Appellee had broken his covenant, and it was his duty to see that no injury resulted to appellant's title by reason of said breach. The court therefore erred in its declaration of law, and in refusing to allow the credit of one hundred and fifty-one dollars, instead of fourteen dollars and one cent."

If appellant had in any way promised to pay the taxes or had said or done that which threw appellee off guard and caused him to fail or refuse to perform the duty primarily resting upon him, the case might be different. Conceding that appellee did not, in fact, know of the tax lien or sale, and, conceding also the good faith of appellant in relying on the advice of counsel, both are innocent parties, and as between them appellee certainly must suffer the burden he voluntarily assumed.

These views necessitate a reversal of the case, and, there being no dispute as to the amount, judgment will be entered here for appellant.

Reversed.

MOYSE REAL ESTATE CO. v. FIRST NATIONAL BANK
OF COMMERCE

[70 South. 821.]

1. **BILLS AND NOTES.** *Corporations. Accommodation notes. Innocent purchaser. Liability. President executing notes. Authority. Presumption.*

Where a corporation is empowered by its charter to execute promissory notes generally, but not to make accommodation paper, it is liable on an accommodation note executed by it to one

purchasing such notes in due course of business for value, without notice.

2. CORPORATIONS. *President executing notes. Authority. Presumption.*

In a suit by a purchaser for value without notice of an accommodation note of a corporation, proof that the president of the corporation executed the note was *prima facie* evidence of his authority to bind the corporation in that manner.

APPEAL from the circuit court of Forest county.

HON. P. B. JOHNSON, Judge.

Suit by the First National Bank of Commerce against the Moyse Real Estate Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Will A. Parsons, for appellant.

Of course we are well acquainted with the doctrine announced in the cases referred to by appellee upon this proposition of estoppel. We take it that where an officer is authorized by the corporation to execute negotiable paper in the name of the corporation and he does so, then the same rule would apply to that paper as would apply to the paper of an individual and the paper would be good in the hands of a *bona fide* purchaser for value even though it was given without consideration or was voidable in the hands of the original party or parties taking with notice for any other reason. For instance in this case if the evidence had shown that J. L. Moyse had authority to issue negotiable paper in the name of the defendant company then the fact that the paper he issued was *ultra vires* or without consideration or merely accommodation would not be available against the paper in the hands of *bona fide* purchasers for value. But the plaintiff asks this court to go further than that and to hold that the defendant is estopped without any showing that the president was authorized to execute negotiable paper for the corporation at all.

Appellee by its position says: It is true these notes are accommodation papers, *ultra vires*, not executed in the course of the business of the corporation, the corporation got no benefit therefrom and all of that but you must pay them. Why? Because they are made payable to bearer. And they call upon the court to estop the corporation by the act of its president in making these notes payable to bearer without any showing that the president had any authority to execute negotiable papers for the corporation. We submit that, in order to estop the corporation by the act of the president it must be shown that the president was authorized to act either in that particular case or generally or that he was held out to the world as having such authority or that the corporation knowingly received the fruits of the act or knowingly retained the same. In other words the actual authority must be shown or some conduct or custom of business acquiesced in by the board of directors that would make it inequitable for the corporation to deny the authority of the president. This is supported by numerous authorities referred to in my brief.

The power of the president of a corporation to execute negotiable paper is not presumed in cases in which the execution of the paper is denied under oath.

The position assumed by the appellee in its brief is the *contra* of the above statement of the law, but appellee makes no distinction as to whether or not the authority of the president is put in issue in the pleadings. Of course, there is a great deal of difference between attacking the execution of an instrument collaterally or by a plea of general issue and there is a difference also between instruments under seal and those not under seal and the rules of evidence applicable depend a great deal on the condition of the pleadings. For instance in one case referred to by the appellee the case of *Kennedy v. Knight*, 94 Am. Dec. 543, the note sued on was not given by the corporation but to the corporation and was transferred by the corporation to a third party who brought suit. The transfer was un-

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Brief for appellant.

der seal and the corporation was asserting no claim to the note. There are a great many cases that hold that where an instrument is under the common seal of the corporation that the purpose of the seal is for the authentication of the instrument and that the presence of the seal on the instrument is some proof of authority. There is a line of decisions from the supreme court of Illinois that by the language of the opinions appear to support this contention but the facts of this case are not at all in the line with the facts of any of the cases from that state. For instance in the case of *Lloyd & Company v. Matthews*, largely quoted in appellee's brief, L. R. A. (N. S.), Vol. 7, page 380, at top of page the court says: "But since the guarantee sued on was placed on the note of appellant and the note was discounted—for its benefit and the proceeds thereof were remitted to appellant—the plainest principles of justice require that the company should be held bound by the act of its president without any proof of authority beyond that which must be presumed from the fact that the president, in good faith and in the regular course of corporate business and for the benefit of the corporation, executed the instrument sued on." How different from the case we are now presenting.

Appellee refers to some cases outside of the state of Illinois, which he claims supports his contention. The first of these is the *National Bank of Terre Haute v. Vigo County*, decided by the supreme court of the state of Indiana in 40 N. E. 800. We contend that this case does not support his contention. In this case the court says: "The president of a corporation by virtue of his office, merely has very little authority to act for the corporation. His powers depend upon the nature of the company's business and the authority given him by the board of directors may invest him with authority to act as the chief officer of the company. This may be done by resolution or by acquiescence in the course of dealings and manner of transacting the business of the corporation." Referring to *Martin v. Webb*, 110 U. S. 7: *Railroad Com-*

pany v. Bastian, 15 Md. 494; *Dougherty v. Hunter*, 54 Pa. St. 380; *Stokes v. Bottery Co.*, 49 N. J. Law 240; *Railroad Company v. McVeigh*, 98 Ind. 319. It is true that this opinion goes on further down and says:

“Where a contract is made by the president in the name of the corporation, in the usual course of business, which the directors had the power to authorize him to make or to ratify when made, the presumption is that the contract is binding on the corporation, until it is shown that the same was not ratified or authorized.” But this principle does not apply in this case as the notes in this case were not executed in the usual course of business. But if it did support the contention of the appellee then it no longer does so for it is squarely overruled by the case of *Elkhart v. Turner*, 170 Ind. 455, which is directly on all fours with the case we are now presenting to this court and from which I will take occasion to quote in support of my position a little later in this brief.

The next case referred to by appellee is the case of the *Eureka Iron Works v. Bresnahan*, 27 N. W. 524. This case does not support their contention but holds that a mortgage executed by a corporation by the president and secretary with the knowledge of all the directors and stockholders of the corporation assembled together where the mortgage was drafted and executed in their presence is binding upon the corporation. This not only does not support the contention of the appellee but it is decided by the supreme court of Michigan; the supreme court of that state later rendered an opinion in the case of *Gould & Co.*, 134 Michigan 517, in which the court in a case directly in point squarely sustains appellant's contention. *Bacon v. Mississippi Fire Insurance Co.*, 31 Miss. 116.

We are also referred to the case of *Paterson v. Robinson*, 22 N. E. 372, decided by the supreme court of New York, as sustaining the contention of appellee. This case rested upon a long course of dealings between the parties and does not hold that in a suit upon a promissory note executed by the president in the name of the corporation,

where the authority of the president and the execution of the note is specially denied and put in issue it is only necessary to show that the president is president and signed the note. Of this case the supreme court of Michigan says in the case referred to above (*the Gould v. Gould & Company*): "We are cited to the case of *Paterson v. Robinson*, 116 New York 193, 22 N. E. 372, in which language is used sustaining the ruling of the circuit judge in the present case, but from the examination we have been able to give the subject, that case would appear to stand alone and for an understanding of the New York Rule should be compared with *Columbia Bank v. Gospel Tabernacle Church*, 127 N. Y. 361.

There is no case in New York that I have been able to find that holds that where negotiable paper is executed in the name of the corporation by its president and the execution of the paper and the authority of the president is specially denied that no proof of the authority of the president other than that he was president and signed the note is required to bind the corporation. There are several cases that hold the opposite of this decided by the supreme court of that state. See the cases from New York referred to in my original brief and see also *Bangs v. National Macaroni Company*, 15 App. Div. (New York Reports), page 524, decided in 1897; *Beltal v. Grand Music Company*, 57 N. Y. Sup. 746; *Life & Insurance Company v. Mechanical Fire Insurance Company*, 7 Wendals (New York) 31; *Rockerfellow v. Lamarro*, 89 N. Y. Supp. 1; *Peoples Bank of City of New York v. Roman Catholic Church N. E.*, 17 S. W. 411.

The case of *Merrill v. Hurley*, 6 S. D. does not sustain the position of appellee and not only so but the supreme court of South Dakota in the case of *Des Moines M. & S. Co. v. Tilford M. Co. et al.*, 9 S. D. 542, decided sometime later, held that there is no implied power in the president to bind the corporation.

The case of the *American Exchange Bank v. Oregon Pottery Co.*, 55 Fed. Rep. 265, is, from appellee's stand-

point, too good to be true. That is too good to be received as sound law, in fact, appellee does not even claim that the pronouncement of this case is sound law. The supreme court of the state of Oregon decided eight years later that the above was not the law.

Appellant's position is also sustained by the following federal authorities: *Potts v. Wallace*, 146 U. S. 706; *Commercial & Co. Insurance Company v. Union Mutual Insurance Company*, 19 Howard 318-322. The case referred to by appellee in 108 Iowa, 522, if it sustains appellee's position, is overruled by the later case of *Marshal Field & Co. v. O. Ruffcorn & Co.*, decided in 1902, 117 Iowa, 159, which holds that where the execution of a note purporting to be that of the corporation signed by its president and incorporated in the complaint is denied under oath, the authority of the president to execute the note must be shown by the plaintiff before recovery can be had.

As to the New York cases referred to they have no application, as I have already shown, to this case we are now presenting.

In support of our position that the authority of the president to execute a note where the execution is denied and his authority put in issue must be proved before recovery can be had and cannot be presumed from the title of his office and his executing the note we refer to the following cases:

New York—*Columbia Bank v. Gospel Tabernacle Church*, 127 N. W. 361; *Bangs v. National Macaroni Co.*, 15 App. Div. (N. Y.) 524; *Bank of New Port v. Snyder Manufacturing Company*, 107 App. Div. (N. Y.) 96; *Rockerfellow v. Lamarra*, 89 N. Y. Supp. 1; *Minors & Co. Bank v. Ardsley Hall Co.*, 113 N. Y. 194.

W. Virginia.—*Evans v. Lumber Company*, 70 West V. 169 (1911); *Thompson v. Manufacturing Company*, 60 W. Va. 42 (1907); *National Bank v. Manufacturing Company*, 56 W. V. 446 (1905).

Iowa.—*Marshall Field Co. v. O. Ruffcorn Co.* 117 Iowa, 157; *Ney v. Eastern Iowa Tel. Co.*, 114 N. W. 383; *Groetz v. Armstrong*, 115 Iowa, 602; *N. W. Packing Company v. Whitney*, 89 Pac. 981; *Alter Placer Mining Co. v. Alta Silver Mining Company*, 78 Cal. 629; *Fontana et al. v. Pacific Can. Co.*, 61 Pac. 580; *Bliss v. Canal Co.*, 65 Cal. 502.

Texas—*Dreiben v. First National Bank*, 99 S. W. 850; *Gulf Grocery Co. v. Crews*, 146 S. W. 654.

Indiana—*Cushman v. Cloverdale Coal and Mining Co.*, 84 N. E. 579; *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455.

Ohio—*Bradford Belting Co. v. Gibson*, 67 N. E. 888.

Montana—*Helena National Bank v. Rocky Mountain Tel. Co.*, 20 Mont. 329.

Oregon—*Crawford v. Albany Ice Company*, 36 Ore. 535; *Sears v. Daly*, 43 Ore. 346.

Pennsylvania—*Worthington v. Schuylkill Electric R. W. Co.*, 195 Pa. St. 211; *Monogahela National Bank v. Harmony Land Co.*, 75 Atl. 687.

Michigan—*Gould v. Gould & Co.*, 134 Mich. 515, decided in 1903; *McClellang v. Detroit & C. Works*, 56 Mich. 579.

Vermont—*Lyndon Mill Co. v. Lyndon L. & B. Institute*, 63 Vt. 581.

Massachusetts—*Murray v. C. N. Neilson Lumber Company*, 9 N. E. 634. This was a suit on an agreement in writing to pay a salary for services rendered. Held, President had no authority to make it.

New Hampshire—*Wait v. Armory Association*, 14 L. R. A. 356.

Louisiana—*Taylor v. Vosburg Min. Springs Co.*, 54 So. 912.

Arkansas—*City E. Street R. R. Co. v. National Exchange Bank*, 62 Ark. 33.

Kentucky—*Roeder v. Lewis and Mason T. R. R. Co.*, 7 Ky. Law 363; *Turnpike Co. v. Looney*, 71 Dec. 491.

In Mississippi in the case of *Bacon v. Mississippi Insurance Company*, 31 Miss. 118, our supreme court said: "Again if the corporation had power to execute the note it must have done so by the president under the authority shown to have been given him by the board of directors.

Sullivan, Conner & Sullivan, for appellee.

The proof is not contradicted and is conclusive that the name of the Moyse Real Estate Company was signed to these notes by J. L. Moyse, president, and the proof is equally conclusive that the company took the mortgage as security for signing the notes. In view of this fact, all other questions raised by defendant in this record become wholly immaterial and should not call for discussion.

The proof in this cause shows that J. L. Moyse, President of the corporation, was in full charge of the offices of the company, and was the only person who appeared to have any authority to act for the company. He negotiated at considerable length and at different times with the other representatives of the bank about these notes. The corporation also, by him as president, had executed another note about another matter which the bank had bought and which the corporation paid. The evidence shows that J. L. Moyse, by his acts and conduct, was the real representative of the corporation, and it is bound by what he did and especially is this true as to innocent purchasers of notes, executed by him in the incorporated name.

POWER TO EXECUTE PROMISSORY NOTES AND RIGHTS OF BONA FIDE PURCHASERS.

The charter of the corporation is very broad and all the authority to conduct the business described in the charter is given that a natural person could have. In fact the power is granted in the charter "to do any and all of the business above mentioned and set forth to the same extent as natural persons might or could do."

The power to execute negotiable promissory notes by the company necessarily flows from this charter. The corporation by its president did issue the notes sued on and made them payable to bearer, and the First National Bank of Commerce bought them before maturity, for value, without notice. The corporation cannot defend as against the innocent purchaser of its notes which it put on the market and which are regular on their face. We cite the following authorities: Joyce on Defenses to Commercial Paper, section 85; *Monument National Bank v. Globe Works*, 101 Mass. 57; 3 American Report, 322; 3 Thompson on Corporations (2 Ed.), sec. 2185.

POWER TO BORROW MONEY AND MAKE NEGOTIABLE PAPER.

"If the execution of negotiable paper is obviously foreign to the purpose of the corporation all persons are chargeable with notice of the *ultra vires* character of such paper. But the business of the corporation is such that it may, under some conditions, have occasion to execute such paper, and it in fact executes it for a purpose foreign to its purposes, as in payment for property which it had no authority to purchase, the paper is binding in the hands of a *bona fide* holder for value without notice. The distinction is between a total want of power and an irregular exercise of an unauthorized power." Eliot on Private Corporations, section 182, last paragraph.

CORPORATION BOUND BY ACCOMMODATION PAPER IN HANDS OF INNOCENT PURCHASER.

"A partner has no right to make accomodation paper in the firm name but the fact that the paper was so made without authority is no defense against a *bona fide* purchaser. Neither is it a defense against a *bona fide* purchaser that paper executed by a corporation was accomodation paper, and *ultra vires*." Norton on Bills and Notes, pages 182 and 183.

Method of executing negotiable instruments.—2 Thompson on Corporations (2 Ed.), section 1890.

ACCOMMODATION PAPER VALID IN HANDS OF INNOCENT PURCHASER.

"Thompson on Corporations, section 2228; Norton on Bills and Notes, page 183. See *Johnson v. Johnson Bros.*, (note) Ann. Cas., 1913 A. page 1314.

"A *bona fide* purchaser of a negotiable promissory note which is void between the parties because given in violation of law, is not affected by the invalidity of the note." See *Arnd v. S. J. Oblom*, Ann. Cas. Vol. 11, page 1179. See *Union Trust Co. v. Preston National Bank*, 4 Ann. Cas. 347. *Citizens State Bank v. Nore*, 2 Ann. Cas. 604.

DISTINCTION IN WANT OF POWER TO EXECUTE NEGOTIABLE INSTRUMENTS AND IRREGULARITIES IN ITS EXERCISE.

3 Thompson on Corporations (2 Ed.), section 2190.

WHERE GENERAL POWER TO ISSUE NEGOTIABLE INSTRUMENTS EXISTED, THE CORPORATION IS LIABLE FOR UNAUTHORIZED NEGOTIABLE PAPER IN THE HANDS OF INNOCENT PURCHASER. 3 Thompson on Corporations, section 2190.

POWER OF THE PRESIDENT TO EXECUTE PROMISSORY NOTES IS PRESUMED IN THE ABSENCE OF PROOF TO THE CONTRARY BY THE CORPORATION.

Anderson v. South Chicago Brewing Co., 50 N. E. 654;

Anderson Transfer Co. v. Fuller, 51 N. E. 253;

Bank of Minneapolis v. Griffin, 48 N. E. 154;

National State Bank of Terre Haute v. Vigo County National Bank et al, 40 N. E. 800; *Eureka Iron Works v. Bresnahan*, 72 N. W. 524.

See 2 Thompson on Corporations, (2 Ed.), section 1452, and cases cited in notes, especially cases from New York. See, also, Elliott on Corporations (3 Ed.), Par. 495, p. 538; *George E. Lloyd & Co. v. Nelson Edward Matthews, et al*, 7 L. R. A. (N. S.), 376.

In the case of *Kennedy v. Knight*, 94 Am. Dec. 543, it was held that the presumption was in favor of the authority of the president of the corporation to give a note or mortgage to secure it and to execute assignment.

DEFENDANT'S PLEA OF NON EST FACTUM ONLY PLACED BURDEN ON APPELLEE TO PROVE THAT J. L. MOYSE WAS PRES-

IDENT OF THE COMPANY AND THAT HE EXECUTED THE NOTES IN THE CORPORATE NAME.

George E. Lloyd & Co. v. Nelson Edwards Matthews et al., 7 L. R. A. (N. S.) 376, and also 79 N. E. 172; *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson v. South Chicago Brewing Co.*, 173 Ill. 213, 50 N. E. 665; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988.

For a full discussion of the presumption of authority of the president, we call the court's attention to 2 Thompson on Corporations, (2 Ed.), section 1462, pages 509, 510, 511, 512; *Smith v. Smith*, 62 Ill. 493; *Union Mut. Life Ins. Co. v. White*, 106 Ill. 67, 48 N. E. 154, 51 N. E. 251, 50 N. E. 655; *Milwaukee Trust Co. v. Van Valkenburg*, 132 Wis. 638, 112 N. W. 1083; See 15 New. 167; *Bliss v. Kaweah Canal etc. Co.*, 65 Cal. 502, 4 Pac. 507.

The president and secretary of a corporation are presumed to have authority to execute a promissory note in the name of the corporation, and the holder of such note will not be affected by the fact that such authority did not exist, unless he is shown to have had notice thereof. *American Exchange National Bank v. Oregon Pottery Co.*, 55 Fed. 265, citing *American National Bank v. State National Bank*, 10 Wallace, 644, and other authorities.

In *Dexter Sav. Bank v. Friend*, 90 Fed. 703, and in *Jones v. Stoddard*, 8 Idaho, 210, 69 Pac. 650, the president of a corporation is presumed to be authorized to execute the notes of the corporation.

In Iowa, in the absence of any showing to the contrary, the president will be presumed to have authority to act for the corporation in all matters within the ordinary course of its business. *White v. Elgin Creamery Co.*, 108 Iowa, 522, 79 N. W. 283.

In New York the president of a Water Company in charge of the work of construction is presumed to have power necessarily pertaining to the corporate business.

Olcott v. Tioga R. Co., 27 N. Y. 456, Am. Dec. 298; 143 N. Y. 430, 38 N. E. 461, 26 L. R. A. 544, note.

In New York, where the president was in the management of the corporation's business and all negotiations were had with him alone, he had power to bind the corporation, etc. *Nichols v. Scranton Steel Co.*, 137 N. Y. 471, 33 N. E. 561.

In New York, where the president was authorized to open an office, he could bind the corporation for furniture purchased by him. *Cross v. Anglo-American Bank Co.*, 79 Hum. (N. Y.) 424.

In the state of Washington the person who appears as the acting president may be treated as the president by persons dealing with him, and they are not required to look beyond such fact. 41 Wash. 480, 84 Pac. 22.

Elliott on Private Corporations, Third edition, section 495, approves the rule that the law presumes the acts of the officers to have been regularly and rightfully made, and that it is not necessary to produce evidence of such authority from the records of the corporations, and says that: "Under the operation of this principal, a deed or mortgage purporting to have been executed by a corporation, which is signed and executed in its behalf by its president and secretary, will be presumed to have been executed by its authority. This rule is of general application."

Cook, P. J., delivered the opinion of the court.

This is an appeal from the circuit court of Forrest county by the defendant below. The declaration declares upon two promissory notes, for three thousand, five hundred dollars each, payable to H. G. Lea, or bearer, and signed "Moyse Real Estate Company, by J. L. Moyse, President." It is alleged that the plaintiff paid value for the notes. Four pleas were filed by the defendant. The first plea is *non debet*. The second plea says that the promissory notes were "without consideration, being

merely given for accommodation, had no connection at all with the business of the Moyse Real Estate Company, which is a corporation, and were without authority either in law or in fact and were *ultra vires* of the corporation, which was not authorized to give the same, and had no power under its charter to give the same." The third plea is *non est factum*. The fourth plea is practically the same as the third, and both are sworn to. Plaintiff filed a replication, properly verified, denying the averments of the second, third, and fourth pleas, and files as an exhibit the charter of the corporation.

We do not doubt that the charter of the corporation confers ample power upon the corporation to execute promissory notes. We will concede, for the purposes of this decision, that the charter does not give the power to the company to make accommodation paper, and that the evidence shows the notes sued on were in fact accommodation and without consideration. The evidence also demonstrates that the plaintiff purchased the notes in the due course of trade, and that it had no information, or reason to suspect, that the notes were given for the accommodation of the payee. In this state of the record we believe that the plaintiff's right to recover is in no wise affected by the fact that the notes were without consideration. The power to execute promissory notes being conceded, we are unable to distinguish this case from a case wherein the maker of notes is a natural person.

The plaintiff assumed the burden and proved affirmatively that the notes were executed by the then president of the company, and the question for us to decide is whether the law will presume that the president had been given authority to sign same, in the absence of any evidence to the contrary. The trial court instructed the jury peremptorily to find for the plaintiff. The correctness of this instruction is challenged by the defendant. Stated concretely, the defendant, appellant here, earnestly and ably contends that no presumption can be indulged that the president of a corpora-

tion had any inherent power to bind the corporation in contracts of this nature, and that the mere proof that the president signed the name of the corporation to the notes in this case signifies nothing, and the plaintiff has failed to successfully carry the burden imposed upon him by the law.

Counsel on both sides have shown great industry and consummate ability in the presentation of their sides of this vexed question. They have exhausted the subject. It is quite apparent, after a careful and painstaking study of the authorities, that the decisions are in irreconcilable conflict. No decision of this court upon the precise question has been called to our attention, and we have not been able to find anything in our books which arrays our court on the one side or the other. Thompson on Corporations, vol. 2, sec. 1457 (2d Ed.), speaking of the conflict in the authorities, has this to say:

“The effect of these divergent views, on the one hand, is to relieve the complaining party of making proof of the president’s authority, for the reason that, where he is in active conduct and management of the business, he must be presumed to have all the powers of any agent exercising like control and management, and to have authority to do what is usually and ordinarily done by such agents or managers. On the other hand, and under the other cases, the burden is cast upon the party seeking to charge the corporation upon a contract made by the president of proving his authority in some of the recognized modes, reducing the proposition to a question of fact rather than of law.”

We think that the wiser and more practical rule is expressed by the supreme court of Illinois in *Lloyd & Co. v. Matthews*, 223 Ill. 477, 79 N. E. 172, 7 L. R. A. (N. S.) 376, 114 Am. St. Rep. 346, viz.:

“It is contended that, even though it be conceded that George E. Lloyd & Co., by E. C. Williams, its president, signed the guaranty, still, as a matter of law, the corporation cannot be held liable without proof of special

authority from the corporation to its president to execute the contract of guaranty. A corporation can act only through its agents, and the president of a corporation, as the agent and corporate representative, has the power, in the ordinary course of business and in furtherance of the corporate interest, to execute contracts and to bind the company in so doing. He is, by virtue of his office, recognized as the business head of the company, and any contract pertaining to the corporate affairs, within the general powers of such officer, executed by the president on behalf of his corporation, will, in the absence of proof to the contrary, be presumed to have been done by authority of the corporation. *Atwater v. American Exch. Nat. Bank*, 152 Ill. 605, 38 N. E. 1017; *Bank of Minneapolis v. Griffin*, 168 Ill. 314, 48 N. E. 154; *Anderson v. South Chicago Brewing Co.*, 173 Ill. 313, 50 N. E. 655; *Anderson Transfer Co. v. Fuller*, 174 Ill. 221, 51 N. E. 251; *Williams v. Harris*, 198 Ill. 501, 64 N. E. 988. If the contract in question had been executed by some agent who ordinarily does not have the power to sign such instruments, and the execution had been put in issue by properly verified plea, as is the case here, then it would be necessary to go beyond the mere fact of the execution of the instrument and prove the authority of the agent to execute the same; but when the contract is properly executed for the corporation by its president, and it is such a contract as the corporation might lawfully make, the proof of the execution by the president is all that is required, in the absence of any evidence to the contrary showing that the contract was not made by the authority of the corporation."

Nearly all of the big business and a large part of the small business is now conducted by corporations, and if it be the law that persons dealing with the president of a corporation about matters of business clearly within the powers of the corporation to transact must deal at arm's length, and demand that the president exhibit his credentials before entering into contracts with him, it

seems to us that not only the corporation, but also those dealing with corporations, will be seriously hampered. It is not our purpose to hold that a president of a corporation has the inherent power to bind the corporation, but we do hold that the fact that the president of a corporation has executed a contract for his corporation is *prima facie* evidence that the president had the authority to bind the corporation.

If it be true that the president did not possess the authority assumed by him in the present case, the proof of his lack of authority was in the possession of the corporation, and there would have been no difficulty in the way of its production. On the other hand, it might be very difficult and expensive for the plaintiff to have secured the evidence to show his authority. This corporation was domiciled in New York City, and while there are means whereby the plaintiff might have secured affirmative proof, yet it is conceivable that the unwilling corporation might see fit to throw many obstacles in the way. Presidents of corporations generally exercise the powers of a general agent, usually by the tacit consent of the corporation and the public rarely stops to inquire about his authority. *National Bank v. Vigo Bank*, 141 Ind. 352, 40 N. E. 799, 50 Am. St. Rep. 330; *Patterson v. Robinson*, 116 N. Y. 193, 22 N. E. 372. The acts done by the president pertaining to the business of the corporation, not clearly foreign to his powers, will, in the absence of proof to the contrary, be presumed to have been authorized by the corporation. This, we think, is a salutary rule, and imposes no hardships upon either party to the contract. The corporation selects its president, and the ordinary business man, generally speaking, assumes that the man made president is the head and front of the corporation. If it be true that the president of any particular corporation is a mere figurehead, with no powers or duties, except as a presiding officer of the board of directors, this fact can be readily established by the corporation.

Affirmed.

WOLFORD ET AL. v. WILLIAMS.

[70 South. 823.]

1. DRAINS. Swamp land districts. Organization.

Where a petition for the establishment of a swamp land district was filed in January, 1912, under Code 1906, section 371, the board of supervisors retained jurisdiction of the proceedings and had the right to complete the organization of the district under that law, notwithstanding the fact that before such completion, the code section was amended by Laws 1912, chapter 207, which changed the mode of procedure.

2. DRAINS. Swamp land districts. Injunctions.

Where landowners were legally notified of proceedings for the establishment of a swamp land district and failed to appeal from the decision of the board of supervisors, they cannot enjoin the collection of taxes due on such swamp land district on the ground of irregularity in the proceedings.

APPEAL from the chancery court of Calhoun county.

HON. J. G. MCGOWEN, Chancellor.

Suit by R. V. Wofford and others against W. T. Williams. Tax collector of Calhoun county. From a decree for defendant, complainants appeal.

This is an appeal from the chancery court of Calhoun county. The appellant R. V. Wofford, and many other land holders along Topashaw creek in Calhoun county, where complainants, and W. T. Williams, sheriff and tax collector of said county, was the defendant to the original bill filed in the chancery court of that county. The original bill sought to enjoin the tax collector from proceeding to collect taxes, claimed to be due on the swamp land drainage district in Calhoun county, known as Topashaw swamp land district No. 1, assessed against the same for drainage purposes; and on the same day the bill was filed the injunction issued. A demurrer, filed to the original bill, was sustained with leave granted to claimants to file an amended bill. On December 7, 1914, the claimants filed

their amended bill, upon which bill the case was finally disposed of.

The amended bill set out that all the complainants, with the exception of one, were residents of Calhoun county, and that all of them were taxpayers in Calhoun county; that they are the owners of certain lands described in the bill of complaint; and that said lands are embraced in and composed in part what is known as Topashaw swamp land drainage district in Calhoun county. The bill then charges that an order of the board of supervisors, dated June 4, 1912, establishing the said district, and all other proceedings connected therewith, were null and void and of no effect, and set out the following grounds upon which complainants base their contention that such proceedings were null and void:

“(1) That there were no notices to landowners of said district given, as required by law, anterior to the attempted formation and organization of the said district. That there was no petition on file setting forth any necessity for the formation and organization of any district comprising or embracing any of petitioners' land at the time of the attempted organization of said district; nor was there any petition on file asking for the survey of any overflowed land along any creek for the reclamation of any swamp or overflowed land for agricultural or sanitary purposes.

“(2) That there was no petition on file, as required by law, at the time of the attempted organization of said district, setting forth the necessity for same, nor the approximate description of the land to be included therein, nor the names of the landowners, nor the post office address of such owners.

“(3) That there was no publication or notice of any kind given to the landowners of any proposed swamp land district embracing said land as required by law.”

The bill of complaint then set up that the matters and things as to the petition and notice or publication were jurisdictional and constituted a condition precedent to the

organization and formation of the swamp land district then being organized. The bill of complaint further sets out that on the 31st day of July, 1912, upon a petition of the commissioners of said district, appointed by the board of supervisors, the board of supervisors of Calhoun county, at its regular August, 1912, meeting, ordered that on the 3d day of October, 1912, the day of the regular meeting of the board for that month, the hearing of the said petition be set, and that citation be issued, as required by section 383 of the Code of 1906, to all parties in interest to appear at that meeting of the board. This notice, according to the allegations of the bill, was inserted in a paper published in Calhoun county, called the Dixie Herald, and addressed to all persons having or claiming any interest in the lands in Topashaw swamp land drainage district in Calhoun county. The bill then charges:

That the notice is insufficient because it contained the "names of none of the owners of the land sought to be placed in said Topashaw swamp land district; that it contained no description of any of the lands in said district; that the said publication contained no reference to any of the purposes for which the said bonds were to be issued; that there was nothing in said notice on its face that would have put a person upon notice, that is to say, any particular persons with reference to any contemplated procedure in said so-called swamp land district matter; that a copy of the above notice and an affidavit of D. P. Hodge, one of the commissioners, with reference to the mailing of the above notices by registered mail to the various parties, was filed on the 17th day of August, 1912, with the clerk of the board of supervisors; and that the notice and publication last mentioned was the first notice of publication that was ever given or made in connection with either the formation, organization, or issuance of the bonds in said swamp land district matter."

It was also alleged in the bill that after the publication of the notice above mentioned, and before the matter of

Statement of the case.

[110 Miss.]

the bond issue had been acted upon, the board of supervisors struck from and took out of the "so-called" district about two hundred acres of land; and that at the October meeting, the time when the petition was set for hearing, the matter was continued by an order of the board until the 6th day of November. It was alleged that at that meeting another twenty acres of land, "which had been previously attempted as above set forth to be incorporated in said so-called district," was taken out of and struck from the district; that the matter of the bond issue was again continued until the next regular meeting of the board; that, at the December meeting to which the bond issue matter had been continued, another order was entered continuing the matter until the January, 1913, meeting of the board; and that at the January, 1913, meeting of the board the petition came on for hearing, asking for the issuance and sale of bonds in the Topashaw swamp land district, and the board ordered the issuance and sale of forty-two thousand, five hundred dollars worth of bonds, with interest coupons attached. The bill then charges that, for the reasons set out above, and again enumerating them, the issuance and the sale of the bonds was illegal, null, and void. The bill further alleges that the bonds were offered for sale and bought by the Bank of Derma, but that the sale was never in fact consummated because the attorneys of the bank refused to approve the regularity of the bond issue; and that, after having failed to dispose of the bonds, the commissioners and their attorneys petitioned the board of supervisors as follows:

"That for the purpose of removing all clouds upon legality of the bonds issue in this cause, it is expedient that a notice be given for further hearing of said cause for the purpose of ratifying and approving all acts of this board with reference to the exclusion of certain lands from said district and changing the details of the form, maturity, etc., of the bonds to all persons interested in said district.

"The premises considered, petitioners pray that Monday, the 1st day of September, 1913, at 10 o'clock a. m. be fixed as a time for the hearing of objections to such actions of the board, and that upon the hearing the said board pass all orders that may be necessary for the purpose of ratifying and approving all acts heretofore done in this cause, and pass further orders carrying out the issuance and sale of bonds of said district in the sum of forty-two thousand and five hundred dollars, in anticipation of the levy and collection of a special tax against the land in said district in the sum of forty cents per acre per annum for the years 1913 to 1938 inclusive, and forty-five cents per acre per annum for the years 1939 to 1943 inclusive, and that the clerk of this board cause three weeks' notice to be given by publishing a copy of said notice once a week for three weeks in the Calhoun Monitor, a weekly newspaper published in said county, and by mailing a copy of said notice within five days after the first publication thereof to all parties owning lands in said district, as shown by the papers on file in this cause by registered mail, and posting notices at the door of the courthouse of said county, and in at least three other public places in said county, directed to all persons having or claiming any interest in the lands in Topashaw swamp land district in Calhoun county."

And acting upon said petition at the August, 1913, meeting of the board of supervisors, the bill of complaint alleges that an order was issued fixing Monday, the 1st day of September, 1913, as a time for hearing objections to the action of the board in all of the previous proceedings, at which time it was proposed by said order that the board pass such orders as may be necessary for the purpose of ratifying and approving all acts theretofore done and such as were deemed necessary for carrying out the issuance and sale of the bonds of the said district in the sum of forty-two thousand, five hundred dollars, and in anticipation of the levy and collection of a special tax against the lands in said district; and the clerk was or-

dered to cause three weeks' notice of such hearing to be given by publishing a copy of said notice once a week for three weeks in the Calhoun Monitor, a weekly newspaper published in said county, and by mailing a copy and notice within five days after the first publication thereof to all parties owning land in the said district, as shown by the papers on file in said cause, and to such other parties as they may have been advised had purchased land therein or now owned land therein, by posting at the door of the courthouse, and at least three other public places in the county, a copy of the notice. And it is charged that all the acts of the board in giving notice as set out above, and attempting to ratify and confirm the prior acts of the board in reference to the said issuance and sale of said bonds, and all other matters in the order of the board of August, 1913, were illegal, null, and void; and, also, an order at the regular September, 1913, meeting of the board passed in pursuance of the order of August, 1913, ratifying and confirming all things that had been previously done on the matter of the bonds and ordering the issue and sale of the bonds, was null and void.

There was a prayer that the injunction issued on the original bill be retained, and that upon final hearing a perpetual injunction be issued, "enjoining and restraining the sheriff and tax collector of said county from selling said lands for the purpose of paying said illegal bonds or paying any other expense incident to the said illegal and proposed 'Topashaw swamp land district in Calhoun county,' and further declaring all the orders of said board with reference to the formation and organization of said so-called swamp land district in Calhoun county and all the proceedings with reference to the issuance and sale of the bonds and coupons, as well as all proceedings with reference to the formation and organization with reference thereto, to be null and void."

A demurrer was filed by the defendant tax collector, setting up the following causes of the demurrer, to wit: (1) Because the said bill is multifarious; (2) because of

the want of equity in said bill; (3) and because said bill is insufficient in law and in substance. A motion was made to dissolve the temporary injunction, and another motion was made suggesting and claiming reasonable attorneys' fees and damages, and ten per cent. on the amount involved.

A decree was rendered sustaining the demurrer and the motion to dissolve the injunction and decreeing against the complainants and their bondsmen in the sum of one thousand, three hundred and forty-three dollars, and sixty-nine cents taxes, and ten per cent, damages thereon in the amount of one hundred and thirty-four dollars and thirty-six cents, making a total amount of one thousand, four hundred and seventy-eight dollars and five cents, with interest at the rate of six per cent. per annum thereon from the date of the decree until paid, together with all costs; and, from this decree, complainants appeal to this court.

POTTER, J., delivered the opinion of the court.

(After stating the facts as above.) It will be noted that the original petition to the board of supervisors for the establishment of the proposed Topashaw swamp land district in Calhoun county was filed on the 3d day of January, 1912, under section 371, Code 1906. The requirements of this section were all complied with when the petition was filed. After the petition was filed, but before the organization of the district had been completed, the legislature passed an act amending section 371 of the Code of 1906. This act was passed March 16, 1912 (Laws 1912, p. 284). It is contended by the appellant that this act was intended as a substitute for section 371 of the Code, and that for all purposes section 371 was repealed. And it is contended that when the act of March 16, 1912, became a law, the board of supervisors should have disregarded all the proceedings had up until that time; that the persons desiring to create the district

should have started anew; that the board could declare a district established, acting under the provisions of section 374 only when it should appear that all the provisions of the preceding section as they existed at the time the district was to be established had been complied with. In our opinion, however, the jurisdiction having already attached before the section of the Code was amended was not divested by the amendment of the section.

“Where one or more sections of a statute are amended in the mode prescribed by the Constitution, the amended sections cease to exist, and the sections as amended are, in effect, incorporated into the original act; but where the new law is a substantial re-enactment of the old, merely changing modes of procedure, but not changing the tribunal or the basis of the right, and where it takes effect simultaneously with the repeal of the old, it must be presumed, even without an express saving clause, that the legislature intended that proceedings instituted under the old law should be carried to completion under the new.” *Mayne v. Board of Com'rs of Huntington County*, 123 Ind. 132, 24 N. E. 80.

Being in court, it was the duty of the complainants in this case to come before the board of supervisors and object to such steps as they believed were unlawful; and if such proceedings were not regular, and orders were made by the board of supervisors in furtherance of the purposes of this drainage district which they believed to be irregular, the right of appeal to the circuit court from such order was granted them by statute.

Before the bonds were actually issued and sold, it appears that every landowner was cited to appear to make objections to any and all irregularities that might have existed in any of the previous proceedings of the board, and in that notice all persons in the district were actually notified in compliance with all the provisions of the amended statute. It further appears that, at a regular time named in the notice, the board proposed to reissue

the bonds in question. The majority of the complainants, if not all of them, appeared at this meeting and protested against the action of the board; and time was granted them within which to file a bill of exceptions and appeal to the circuit court.

This idea was abandoned, and an injunction was sought restraining the collection of taxes in lieu thereof. In our opinion, the action of the chancellor in sustaining the demurrer to complainants' bill for injunction was correct. At the most, the proceedings of the board of supervisors, after the passage of the amendatory act of 1912, were irregular, and the complainants and all other persons owning property in the district were parties thereto, and, if they desired to challenge the correctness and regularity of the board of supervisors, they ought to have pursued the remedy provided for them by statute. The action of the board of supervisors was not subject to collateral attack.

The decree of the chancellor is affirmed.

Affirmed.

GRAHAM v. COVINGTON COUNTY ET AL.

[70 South. 825.]

EMINENT DOMAIN. Highway. Change of grade.

Where the commissioners of a highway district acting under the authority conferred by Acts 1910, chapter 149, with the approval of the board of supervisors, established a new grade for a highway running in front of plaintiff's property by cutting down the old grade from three to six feet thus destroying the entrance and exit to plaintiff's residence, plaintiff who had made his improvements in reference to the old grade was entitled to recover damages against the county but not against the commissioners individually.

Appeal from the circuit court of Covington county.

HON W. H. HUGHES, Judge.

Suit by Leon Graham against Covington county and others. From a judgment sustaining a demurrer to plaintiff's declaration, he appeals.

The facts are fully stated in the opinion of the court.

E. L. Dent, for appellant.

From the facts as alleged in the declaration, which the demurrer admits, in the first count it is evident that appellant's private property was damaged for public use without due compensation having been first made, and in the second count it is evident that appellant's private property was taken without due compensation having been first made; the defendants herein acting for and on behalf of the county in so taking and damaging appellant's property and section 4404 of the Code of 1906, says that such damages shall be paid out of the county treasury and as chapter 149 of the Acts of 1910 makes the commissioners an adjunct or arm of the county through and in connection with its board of supervisors, it is manifest that not only the county but the parties through whom it primarily acts should be made joint defendants as was done in this case.

The board of supervisors represented the county, and while the defendant commissioners represented the district they are wholly under the supervision and control of the board of supervisors.

As the only question to be determined in this controversy is: Does the declaration state a cause of action against the defendants?—and on this point the case of *Rainey v. Hinds County*, reported in 78 Mississippi 308, is referred to, and as that case is on all-fours with the case at bar, in the language of Justice Terrell, speaking for this court: "I think the plaintiff has brought himself within the letter and spirit of our constitution and statutes upon the subject." In noticing the *Rainey* case,

however, as it was before this court the second time, see 79 Mississippi 238. I am impressed that the case at bar is much stronger than that case, because there the "damage was the work solely of the overseer." In the case at bar the plans and specifications, or in other words, the survey and estimate as made by the engineer and approved by the defendant commissioners, and the defendant commissioners reported the same to the board of supervisors, whose duty it was to order the clerk to file the same among the records of the office and spread the same on the minutes of the board, and make an order adopting said survey, an estimate, so reported and adopted by such commissioners, all of which was done and instead of the board of supervisors rejecting the survey and estimate of the engineer and commissioners they thought proper to ratify the same and thereby made the county liable for all damages resulting from the afterwards damaging and taking appellant's property.

Certainly if the defendants herein were proceeding to damage and take appellant's private property for public use in an unauthorized way and over the appellant's protest, the appellant ought to recover.

In the case of *Illinois Central Railroad Co. et al. v. State ex rel., Dist. Attorney*, reported in 48 So. 561, this court, through Justice Mayes, among other things said: "Section 17, article 3, of the constitution of 1890 stands as a sentinel guarding the right of the private owner of property not to have same taken or damaged for public use, except upon due compensation being first made to the owner, however small may be the value of that taken, or slight may be the damage; and this is true, whether the taking or damage is at the instance of a municipality, county, or other person or corporation possessing eminent domain powers. The importance of this section of the constitution as affecting the welfare of the citizens of the state cannot be too strongly emphasized."

I respectfully maintain that the declaration or either one of the counts therefore state a cause of action, and

that the court erred in sustaining the demurrer and dismissing the cause, and for this error by the court below, the demurrer should be overruled by this court and the cause reversed and remanded.

W. U. Corley, for appellee.

If chapter 149 invites the road commissioners to have roads graded, and it certainly does, then no liability attaches to the county because there acts are within the statute. If they were not acting within the statute, then no liability attaches to the county for the wrong of these district officers.

Appellant contends that section 5, chapter 149, Acts of 1910, means that when the commissioners and the engineer survey and lay out a road, that it must be a road already laid out and established. It would be impossible to lay the foundation of a house that was already laid. So it was certainly not contemplated by the legislature that a civil engineer could not lay out a public road and a commissioner adopt his survey unless he follow the meanderings of an already established road. However, we do not see the importance of this argument here, when as a matter of fact the so called "change and alteration" consisted of lowering the grade. Appellant contends in the second paragraph of page 3 that a road cannot be constructed and maintained until it is first laid out, located and established. He contends further that this act makes no provision or suggests any scheme or makes any intimation whereby a road could be laid out, located and established, or even altered or changed. Section 5 specifically provides who may survey and lay out roads and that the commissioners are specifically authorized to reject or adopt. Now it will be borne in mind by this court, that section 4400 of the code has no reference to the lowering or raising of grades when it uses the words "altered or changed," and therefore all have complied with the special act, and no liability attaches to Covington county.

With reference to appellant's declaration to the word "Construct," the authority cited certainly has no weight here. This was no railroad they were building and they were not bound by any charter requiring them for a certain point of beginning, a specified country to traverse, or a designated termini.

The case of *Rainey v. Hinds County*, 78 Miss. 308, is quite a different case from the case at bar. There the board of supervisors building roads under the Code of 1892 was acting for the county, and if at all, by a direct taxation on all of the county alike. This case is a specified part of the county working under a different act from the remainder of the county. While we are on this point, permit us to say that districts one, two and three of Covington county are all working separately; each having expended about fifty thousand dollars for road construction. Now would it be right, if district one committed a grievous tort, and then required districts two and three to be taxed additionally to pay district one's wrongs? Or go further, and require districts four and five working under still different systems to be taxed to pay for the torts of district one? We think not. Now let it be borne in mind that this Rainey case while decided adversely to the county on the pleadings again came into this court (79 Miss. 238), that the road was badly constructed and that this was called to the attention of the board and that the board refused to intervene, still this court held that the county was not liable.

It is true that the constitution guarantees that private property shall not be taken without due compensation. It also is true that the innocent are not to be made to suffer for the wrongs of wrongdoers. So that, if appellant has been wronged, a redress is usually provided for every wrong, and perhaps appellant has such a redress at his command, if he has been injured, but we do not think that liability attaches to Covington county, and feel confident that neither count of appellant's declaration states a cause of action against the county.

HOLDEN, J., delivered the opinion of the court.

The appellant, Leon Graham, plaintiff in the circuit court below, filed his declaration against Covington county and three other defendants, appellees here. A demurrer was filed to the declaration, and was sustained, from which action of the court the plaintiff appealed. The declaration contains two counts, and in substance states a cause of action as follows:

The plaintiff, Leon Graham, in November, 1913, owned certain land upon which his home was built, and on which he resided with his family; that through, over, and across said land was a public highway with established grades; that the plaintiff had made certain improvements on the land adjacent to this public road, such as his dwelling house, barn, and other buildings, and had situated thereon also his garden, well, woodyard, sheds, gates and other conveniences in and about his residence and adjacent to this public highway, all of which were established in accordance with the grade and surface level of the public highway. This land was in supervisor's district No. 1, which had come under chapter 149, Acts 1910, in reference to building, constructing, and maintaining public roads in this district. The defendants O. C. Conner, W. A. Sanford, D. L. Coulter were appointed by the board of supervisors of said county, acting under said chapter 149, Acts 1910, highway commissioners of said district; that said highway commissioners having full jurisdiction over the said public highway running across plaintiff's land, acting under the authority and approval of the board of supervisors of the county, caused a new grade to be established in this public highway in front of plaintiff's residence whereby the said public road was cut down in grade from three to six feet, thereby destroying the entrance and exit to plaintiff's residence, and causing him to suffer other great inconvenience in the use of his property there situate; that the said cut and alteration in the grade was unreasonable and unnecessary in the construction of said

road, and damaged the property of plaintiff; that said cut and alteration of the grade was made according to the plans and specifications adopted by the highway commissioners acting under, for, and with the approval of the board of supervisors of the defendant county—all of which damaged the plaintiff in the sum of two hundred and fifty dollars.

We think the court below committed error in sustaining the demurrer to plaintiff's declaration, as it states a good cause of action against the county, but not against the other defendants. It seems to us that this case clearly comes within the rule announced in the case of *Rainey v. Hinds County*, 78 Miss. 308, 28 So. 875.

Reversed and remanded.

HOLMES BROS. v. DEER.

[70 South. 826.]

WITNESS. Examination. Cross-examination.

A defendant has a right during the trial to withdraw his plea of the statute of limitations by so stating when upon the witness stand, however this is a personal right which may be exercised voluntarily by a defendant, and until exercised it is presumed that he wished to claim the advantage of this plea, and plaintiff has no right upon cross-examinations to attempt to persuade him to withdraw it.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Special Judge.

Suit by Holmes Bros., a partnership, against A. G. Deer. From a judgment for defendant, plaintiff appeals. The facts are fully stated in the opinion of the court.

Mixon, Holmes & Cassidy, for appellant.

F. C. Lee, and *C. W. McKnight*, for appellee.

SYKES, J., delivered the opinion of the court.

Holmes Bros., the appellants here, partners in the mercantile business in the city of McComb, filed suit in the circuit court of Pike county against A. G. Deer, appellee here, for the sum of two hundred and ninety-five dollars and sixteen cents, balance claimed to be due appellants on an account with appellee beginning in the year 1908 and running through the year 1911. Suit was filed August 13, 1913. The appellee pleaded the three-year statute of limitations as to all the account made prior to January, 1910, and denied under oath the correctness of the account of Holmes Bros., showing specifically wherein it was incorrect. He further pleaded payment, and also filed a plea of the general issue.

It is the contention of appellants that there were certain payments made on this account without any direction from the appellee as to how these payments were to be applied, and that the appellant applied them to the oldest items on said account. The appellee claims there was an agreement between him and appellants that all payments made by him were to be first applied to that part of his account beginning after January, 1910, and that any overplus should be applied on the old debt. The jury were correctly instructed upon the question of the application of payments, and returned a verdict for the defendant.

In the examination of the appellee Deer, appellants' attorney asked him the following question:

"Now, I will ask you whether or not you would refuse to pay Holmes Bros. anything you might owe them, if you owe them anything, because the account is barred by the statute of limitations."

An objection was interposed by the attorney of appellee, which was sustained, to which ruling of the court appellants excepted.

This court, in the case of *Lewis v. Buckley*, 73 Miss. 58, 19 So. 197, held that the defendant had a right during the trial to withdraw his former plea of the statute of limitations by so stating when upon the witness stand. To this proposition we agree. We hold, however, that this is a personal right which may be exercised voluntarily by a defendant, and until exercised it is presumed that he wishes to claim the advantage of this plea, and that the plaintiff has no right upon cross-examination to attempt to persuade him to withdraw it, as is the effect of the above question.

Affirmed.

ALEXANDER COUNTY NAT. BANK v. CONNER.

[70 South. 827]

BANK OF BANKING. Collection of drafts. Trust. Insolvency.

Code 1906, section 4852, providing that a bank or other person collecting a draft with a bill of lading attached shall retain the money so collected for the space of ninety-six hours after the delivery of the bill of lading, is intended merely to give the debtor or consignor sufficient time to investigate his purchase and if dissatisfied, to sue by attachment in the local courts, and in such case a bank collecting for the owner's drafts with bill of lading attached does not hold the money collected in trust so that a trust may, on the insolvency of the collecting bank be impressed upon its assets, but the owner of the drafts is a mere general creditor.

APPEAL from the chancery court of Adams county.

HON. R. W. CUTTER, Chancellor.

Bill by the Alexander County National bank, against L. P. Conner, receiver of the first Natchez bank. From a decree sustaining a demurrer to the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

A. H. Geisenberger and S. Beekman Laub, for appellant.

In the case of *Wm. Ryan & Sons v. R., Paine Receiver, et al.*, reported in 66 Miss. 678, our supreme court, speaking through Judge Campbell, under a state of facts, said:

R. A. Honea, of Aberdeen, Miss., was indebted to the firm of Ryan & Sons, of Dubuque, Iowa, who drew on him through the bank of Gattam & Co., at Aberdeen for collection, Honea, being a customer of the bank, although his account was overdrawn, gave his check on the bank as cash and took up the draft. The bank then sent its New York Check to Ryan & Sons, which was protested. Meantime Gattam & Co. had failed and Paine was appointed receiver of the assets. Honea paid no money to the bank, but he was solvent, and the check was charged to him by the bank. *Held*, that Ryan & Sons, in equity were entitled to impress a trust on so much of the assets of the bank in the hands of the receiver as consisted of the debt from Honea incurred by the check for the sum due Ryan & Sons.

In the case of *Kinney & Co. v. R. Paine, Receiver et al.*, a case very similar to the *Ryan case, supra*, and the instant case, the court again speaking through Judge Campbell (68 Miss. page 258), held to the rule as laid down in the *Ryan case*. *Lizzie A. Billingsley v. W. A. Pollock, Receiver*, 69 Miss. 759.

The appellant filed her bill in the chancery court, having jurisdiction over the receiver, and, after setting out the facts as above stated, prayed that the collection made

by the bank he declared a trust, and a lien impressed on the general assets of the bank therefor, and that the receiver be directed to pay the same in preference to the general debts of the bank.

The plea of the receiver set up the fact that the collection, when made by the bank, had been, in the manner stated, commingled with the general assets, and could not be separated or distinguished; and that the amount of money on hand at the time of the bank's suspension was less than four hundred dollars, (while the note, being in amount, the preference claimed, was for one thousand dollars), and assets of all kinds were far less than the liabilities, and, in view of these facts, the plea alleged that there was no lien in favor of petitioner, or right to demand payment, in full, of her debt.

The lower court held the plea sufficient, and, petitioner declining to amend, the petition was dismissed, from which decree complainant appealed, and the decision of the lower court affirmed.

Appellants in the instant case readily admit the correctness of the rule (or rather the limitation of the rule) as laid down by the eminent Judge Campbell in the Billingsley case, however the facts of the case now before the court, and the cases of *Ryan & Sons v. Paine* and *Kinney & Co. v. Paine, et al.* (*supra*) are vastly different from the facts in the Billingsley case.

In the case of *Ryan v. Paine*, Honea paid the draft drawn upon him, by a check, and though having no funds in the bank, his check was treated as cash by Gattam & Co., as they knew that he was solvent and the amount of the overdraft could be made out of him. In the case of *Kinney v. Paine*, Carroll was also overdrawn, but was solvent, and the receiver expected to collect the money, to the amount of the overdraft through the suit which he (the receiver) had instituted against him (Carroll) when Kenney & Co. filed their bill.

In each of the two above cases the amount due from the respective debtors (Honea and Carroll) to the bank, con-

stituted a trust fund, and the preferences asked for, were granted.

In the Billingsley case, however, an entirely different state of facts existed. In that case a promissory note for the sum of one thousand dollars, was sent to the bank for collection; when the bank suspended business the total amount of cash, on hand, was only four hundred dollars, thus precluding the idea of a trust fund, or preference, since the amount, claimed as a preference, exceeded the total amount of the cash in the possession of the bank when it failed. And therefore there was nothing to which the trust for the amount of one thousand dollars could attach.

In the Ryan case and in the case of *Kinney v. Paine* the amount due the bank on the check of Honea in the one case, and Carroll in the other, was money which the receiver could, and did collect separately and distinctly from the money that was placed in the general funds of the bank. In the instant case the trust is made even more binding by section 4852, Code 1906, which is as follows: "A Bank or other person collecting a draft with bill of lading attached, shall retain the money so collected for the space of ninety-six hours after the delivery of the bill of lading. No other state in the Union has a statute similar to this one, and therefore no case can be found which will be directly in point with this one under review. This statute, so far as we have been able to ascertain, has never been construed by our supreme court. In reference to the draft paid by R. Veiner & Co. the petition alleges: " . . . That the said draft was duly presented to R. Veiner & Co. on the twenty-third day of October, A. D. 1913, and the same was presented to R. Veiner & Co. through the First Natchez Bank, and was paid to the said bank on the twenty-third day of October, 1913; that under the law the said First Natchez Bank held the money so paid to it, until the lapse of the ninety-six hours, when on the twenty-seventh day of October the said First Natchez Bank sent a draft to peti-

tioner, for the sum of five hundred and seventy-four dollars and twenty-five cents . . . this draft was duly and promptly presented for payment on the thirty-first day of October, 1913. (This date should have been the thirtieth day of October. See copy of protest of draft, Transcript page 4, top of page) and was protested for the reason given "Bank Closed."

In reference to the draft paid by Postelthwaite & Stewart, the petition alleges: ". . . That said money so paid by the Postelthwaite & Stewart Co. was required by the laws of the state of Mississippi, section 4852 to be paid for ninety-six hours before being sent to the consignee; that therefore when the said draft was paid by Postelthwaite & Stewart Co., the car of grain was delivered to them, and the money was held by the said First Natchez Bank, and was so held at the time the said bank went into the hands of receivers, on the thirtieth day of October, 1913."

These allegations being properly pleaded are admitted by the demurrer, so that the proposition to be decided on this appeal, is not whether the money was held by the First Natchez Bank, in the first instance, as a trust fund, but whether or not it was so commingled, with the other funds of the bank, that it lost its identity as a trust fund. In the case of the *Continental National Bank v. Weems*, 69 Tex. 489, 5 Am. St. Rep. 85, the agreement between the Continental National Bank and the City Bank of Houston takes the place of section 4852 in this case.

The Weems case is followed in *Hund v. Townsend*, 26 S. W. (Tex.), 310. In the case of *Sayles v. Cox*, 95 Tenn. 579, 32 L. R. A. 715, the court holds that a bank which makes "a collection before it makes an assignment, even though it be in fact insolvent, it simply becomes an ordinary contract debtor of the owner, and he cannot impress any trust character on the proceeds." But the court further says: "There may be special facts which will take the case out of the general rule, and here the

court refers to the case of *Continental Bank v. Weems, supra*.

Section 4852, Code 1906, places the instant case on all-fours with the Weems case. By the agreement in the Weems case, the complaining bank says to the bank complained of: "You collect these notes, which I am sending you, and preserve the proceeds thereof, as my money, and return them (the proceeds) to me as such." Section 4852 said to the First Natchez Bank: "When you collect a draft with bill of lading attached thereto, you must retain the money so collected for the space of ninety-six hours after you deliver the bill of lading to the consignee." The agreement in the one case, and the statute in the other, establishes clearly the trust relation.

The purpose of this statute is to keep the money where it can be subject to the process of the local courts, so that if the commodity shipped, is found by the consignee, after inspection to be damaged or otherwise faulty, the bank could be garnished and the money recovered by the consignee.

The bank failed before the expiration of the ninety-six hours after the delivery of the bill of lading to and the payment of the draft by the Postelthwaite & Stewart Co. The four hundred and thirty-three dollars (being the amount of the collection on the draft), was in the vaults of the bank on the day of its failure; it had to be there, the law commanded the bank to keep it there for ninety-six hours, and the presumption is that the law was followed, and that part of the fifteen thousand dollars found in the vaults of the bank was the four hundred and thirty-three dollars.

Had Postelthwaite & Stewart Company found this grain to be faulty, and had garnished the bank, would this court allow the bank to say that the money was not there, when there was fifteen thousand dollars in the vaults of the bank, and the ninety-six hours had not yet expired. If the bank could not make such claim, then the receiver could not, for he takes the property subject

to all its trusts and incumbrances. This money went to swell the assets of the bank, and this satisfies the rule, as to the identification of trust funds. *People v. Bank of Danville*, 39 Hun. 187; *Weems case*, *supra*; *Western German Bank v. Norvell*, 134 Fed. 726.

The ninety-six hours had elapsed since the delivery of the bill of lading to R. Veiner & Company, and the failure of the First Natchez Bank, but we believe that the right to the preference asked under the facts of this portion of the instant case is equally as strong as the right shown in the former state of facts.

The statute made the bank a trustee, and its trust obligation could not be cancelled until it had paid to the appellant the amount collected by it from R. Veiner & Company, on the draft sent it (The First Natchez Bank) for collection. If this were not so, then the section 4852 would operate to render non-collectible, funds that would have otherwise been collected. That is to say, the statute would itself defeat the right of the remitting (Alexander county) bank to be paid in full. This we do not think was the intent and purpose of the law, nor should it be so construed.

L. T. Kennedy, for appellee.

In order that the appellants may have the assets of the First Natchez Bank impressed with a trust for the payment of the proceeds of the two drafts shown to have been collected, it is necessary that they should show that the identical money which was collected from the respective consignees came into the hands of the receiver and was held by him in specie or that the respective funds had been mingled with the funds of the bank which came into the hands of the receiver and constituted in part the gross sum held by him, or that their identical money had been invested by the Bank in tangible property which came into the hands of the receiver and is by him now held.

If it can be shown that the identical money came into the hands of the receiver, we concede that the appellant should recover but we conceive the law to go further and hold that the appellant would not be required to identify the particular money if it could show that the particular money had been mingled with the funds of the bank that came into the hands of the receiver, as for instance, if the proceeds of the drafts had been kept separate from the other funds of the bank after collection and mingled with the other funds of the bank after its suspension so that there could have been no opportunity for any of the identical money to have been paid out or used by the bank in its usual course of business.

I conceived that the cases cited by appellant in his brief hold the above to be the law which, if correct, will absolutely settle the disposition of this question. The case of *Ryan v. Payne*, reported in 66 Miss. 678, was decided in accordance with the identical rule above announced.

A draft was drawn by Ryan & Sons on Honea through the Bank of Gattman & Co, Honea gave a check to Gattman & Co. to pay the draft, which check overdrew the account of Honea with the said bank. The bank was placed in the hands of a receiver before Honea made a deposit to cover his over-draft and to meet the check which he had given to the bank to cover the draft in favor of Ryan & Sons. Our supreme court held that Ryan & Sons were entitled to impress a trust on so much of the assets of the bank as consisted of the debt from Honea collected by said bank.

Measuring this decision by the rule above announced, we find that it is in absolute accordance therewith because the assets of the bank which passed into the hands of the receiver had amongst them the specific debt due by Honea to Ryan & Sons. If Honea's check had been duly paid so that the receiver of the bank would have had no action against Honea on account of this specific transaction and there had been no specific debt or tangible

property in the hands of the receiver to be identified as the proceeds of the Ryan draft, the decision certainly would have been otherwise.

If the receiver of the First Natchez Bank had any claim against R. Veiner & Co. or Postelthwaite-Stewart-Co. for checks given to pay either of the drafts in question, the appellant would have the right to pursue the debt and collect it from the consignee if they had not paid it or from the receiver of the First Natchez Bank if they had paid it to him.

The case of *Kinney v. Payne*, reported in 68 Miss. 258, announces the exact same rule, permitting the drawer of the draft to pursue the debt as against the drawee who, in fact, had not really paid the debt to the defunct bank, and held that the drawer of the draft was the real owner of the debt, and the fact that the drawee had given a check to the defunct bank to cover the draft did not change the ownership of the debt in as much as the debt had not really been paid but was yet due by the drawee.

Neither of the cases cited above are authorities which settle the principle of the case at bar but only aided us in determining the true character of what is meant by a trust fund or having the assets of a defunct bank impressed with a trust.

The case of *Billingsly v. Pollock*, reported in 69 Miss. 759, decided the exact proposition presented to the court in the case at bar. The only difference in the facts of the two cases being that it was a note sent for collection in the Billingsly case, while it is a draft in the present case, and there was not enough money in the hands of the receiver to pay the claim in the Billingsly claim while there is in the present case, neither of which facts, however are considered or commented upon in the opinion of the court and which we hold are immaterial facts as regards the determining of the present issue.

I conceive that counsel for the appellant will concede that the law governing the collection of a note and the collection of a draft under the circumstances recited, is

the same, and we submit to the court that the fact, whether or not there is sufficient funds in the vaults at the time of the failure and passing into the hands of the receiver, to cover the item in question, is immaterial as determining the right to have the same impressed with a trust. The failure of a trust in part would not defeat the trust *in toto*, and whatever fund may thus be held in trust at the time of a bank's failure, less the entire amount claimed, is impressed with a trust character. (5 Cyc, 567.)

Counsel for appellant, in his brief, page three, lays particular stress upon the plea of the receiver in the Billingsley case and the fact that the bank, at the time of its suspension had less than four hundred dollars on hand while it is very noticeable that Campbell, C. J., who delivered the opinion of the court, did not mention either of said facts as material to the issue but rendered his decision upon an entirely different proposition and did not announce any rule where either of said facts was involved. The organ of the court referred to the cases above discussed and reaffirmed the principle supporting them, "that a party who had sent his claim to an insolvent bank for collection, and which is collected by a check on itself by the debtor who had no funds in the bank, could follow and reclaim their own in the hands of the receiver, but was unwilling to establish the proposition that a customer of a bank, whose claim it had collected and failed to pay over, had a preferred claim over all other creditors of the bank."

The drawee of the drafts were discharged in the case at bar like the maker of the note in the Billingsly case for they paid them to the First Natchez Bank several days before it suspended and while they were engaged in the banking business as shown by the bill of complaint.

For the appellant to recover, it is necessary that the amount so paid by the said R. Veiner & Co. and Postelthwaite Stewart Co. can be traced as constituting a part of the fifteen thousand dollars admitted to have passed into the hands of the receiver, but this cannot be merely

110 Miss.]

Brief for appellant.

presumed but it is necessary to allege and show that after the said payment, the said funds were kept segregated, or if placed in the general fund, that no checks were afterwards paid or any of the general business of the bank conducted, or use made of money on hand, or any of the same.

Section 4852 of the Code of 1906, is a law of the state of Mississippi under which the appellant sent the draft into this state for collection. He had notice of the statute before sending the draft and cannot complain of its effect. The purpose of this statute is well explained in the brief of appellant, and how a statute with a purpose so well explained and understood could have the effect as against the other creditors and depositors of a defunct bank as claimed in the brief for appellant, I am unable to understand.

If the consignee should have a right of action on account of damaged shipment his action is by attachment against the collecting bank, which bank is required to answer whether or not it is indebted and not whether it has the particular funds on hand paid to it by the consignee.

Section 4852 of our Code will not take the place of the agreement referred to in the Texas case by counsel of appellant because the statute and the agreement had an entirely different purpose. The agreement in the Texas case provided that the proceeds of such discounts should be preserved as the property of the complainant and returned to it as such, while section 4852 does not require that the proceeds of the draft be preserved and forwarded after ninety-six hours.

Counsel for appellant emphasizes the fact that section 4852 requires that the money so collected must be retained for the space of ninety-six hours but the section nowhere requires that the money so collected be forwarded to the drawer, but the allegations in this case show that a draft was sent in one case and not the money.

The case of the appellant must stand or fall upon the duties that the First Natchez Bank owed to appellant and not upon what duty the First Natchez Bank might owe, by statute to a person from whom it has collected a draft with bill of lading attached. The law requires the money so collected, to be retained but does not require the money so collected, in specie as appellant would have you believe, to be forwarded and such is not done in the usual course of business.

Appellant would seek a strict construction of the phrase "money so collected" and yet does not allege that the drafts were paid in money. We submit that the record does not show or the bill of complaint allege that the proceeds of the drafts in question ever came into the hands of the receiver or that he, as receiver, has any asset as the result or purchased with said proceeds which is the only and true test of the right to impress a trust in such cases as the one at bar.

SYKES, J., delivered the opinion of the court.

Appellant filed its bill in the chancery court of Adams county, praying that a lien be fixed upon funds in the hands of the receiver of the First Natchez Bank for the amounts herein below set out, and that said receiver be required to pay these amounts out of any funds in his hands as receiver. The facts alleged in the bill are, in substance, as follows: During the month of October, 1913, Antrim & Co. of Cairo, Ill., shipped a car of grain to the firm of R. Veiner, of Natchez, Miss. Draft for five hundred and seventy-four dollars and twenty-five cents against consignee in payment for same was attached to the bill of lading, and draft and bill of lading were sent by the appellant bank to the First Natchez Bank for collection. Said draft was paid to the First Natchez Bank when presented. On October 27, 1913, the First Natchez Bank sent a draft to appellant bank for the said sum, drawn upon the American National Bank of St. Louis,

Mo. This draft was duly presented for payment by appellant, but was protested for nonpayment because the First Natchez Bank was placed in the hands of a receiver on October 29, 1913. Shortly after this shipment, and also in October of the same year, the same firm shipped to Postelthwaite & Stewart, of Natchez, Miss., a car of grain. A draft for four hundred and thirty-three dollars, the purchase price, with bill of lading attached, was drawn on consignees and placed in the hands of appellant bank for collection and sent by appellant to the First Natchez Bank. This draft was presented by the First Natchez Bank on the 27th or 28th of October and paid by the consignee. No draft for this amount was forwarded by the First Natchez Bank to the appellant bank. On October 29, 1913, said First Natchez Bank went into the hands of a receiver, having in its hands at that time fifteen thousand dollars, more or less, in cash. A demurrer was interposed to the bill of complaint and sustained, from which action of the chancellor this appeal is prosecuted.

It is the contention of the appellant that the amounts collected as above set forth were trust funds which increased the assets of the bank to that extent, and that a lien should be fixed on said assets in the hands of the receiver for said amount; that this is true both under the common law and under section 4852, Code 1906, which is as follows:

“A bank or other person collecting a draft with a bill of lading attached, shall retain the money so collected for the space of ninety-six hours after the delivery of the bill of lading.”

The above section of the Code, however, in no way alters or changes the common-law rule. This section was enacted for the purpose of having the collecting bank remain the debtor of the consignor or its assignee for a sufficient length of time, during which the consignee could examine his purchase and bring suit, if necessary, at his domicile by attachment and garnishment of the funds in the hands of the collecting bank. But the relation of

debtor and creditor between a consignor or his assignee and the collecting bank exists under this statute just as under the common law. We adhere to the ruling announced by this court in the case of *Billingsley v. Pollock*, 69 Miss. 759, 13 So. 828, 30 Am. St. Rep. 585, wherein the court says:

“We are well pleased with these decisions, and reaffirm the obvious principle supporting them, but are unwilling to establish the proposition that a correspondent of a bank, whose claim it has collected and failed to pay over, has an equitable lien on all the assets of the bank, securing precedence over all other creditors of the bank.”

The appellant in this case has no lien whatever on any moneys or assets in the hands of the receiver, but is simply a general creditor of the defunct bank and should be treated as such.

Affirmed.

GULF & S. I. R. Co. v. DANA.

[70 South. 828.]

1. MASTER AND SERVANT. *Injuries to servant. Questions for jury. Defective appliances. Constitutional provision.*

In a suit by a switchman against a railroad company for injuries resulting from defective couplers on cars the court held that it was a question for the jury under the facts as to whether or not plaintiff was guilty of contributory negligence.

2. DEFECTIVE APPLIANCES. *Constitutional provisions.*

A yard foreman switchman does not come within the excepted class of employees. Under section 193 of the Constitution which provides that “knowledge by any employee injured of the defective, or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductor or engineers in charge of dangerous or unsafe cars on engines voluntarily operated by them.

Appeal from the circuit court of Harrison county.

HON. J. I. BALLENGER, Judge.

Suit by J. C. Dana against the Gulf & Ship Island Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

B. E. Eaton, for appellant.

E. J. Bowers and *E. E. Brogan*, for appellee.

HOLDEN, J., delivered the opinion of the court.

J. C. Dana, plaintiff below and appellee here, sued the Gulf & Ship Island Railroad Company, defendant below and appellant here, for damages for personal injury, in the circuit court of Harrison county, and obtained judgment, from which this appeal is taken. Appellant assigns several errors of the court below; but we think only one of the assignments of error deserves consideration and discussion here, and that is, the appellant contends that a peremptory instruction to find for the appellant should have been given upon the facts in the case, which are briefly stated as follows: Dana was foreman of a switching crew in Laurel, Miss., in August, 1908, and was there working as a switchman in charge of the switching operations for appellant. In the course of his duties, he undertook to make a coupling between two cars; and as one of the cars was backing toward the other to which the coupling was to be made, he noticed that the knuckle on the drawhead of the moving car, which was one of appellant's cars was twisted and defective, and that there would be some difficulty in making the coupling on account of the defective and twisted condition of the knuckle in the drawhead of the moving car. As the ground where he was compelled to stand in making the coupling was unusually high, he concluded it would be safer for him to undertake the coupling by using his foot to shove the drawhead into a proper position to couple with the draw-

head of the standing car, instead of using his hand for that purpose. Under these circumstances, as the moving car approached the standing car, he used his foot in shoving the knuckle and drawhead to properly make the coupling, and in doing so his foot was mashed partly off on account of the defective knuckle and drawhead.

The plaintiff testified he did not believe that the kicking of the coupling with his foot was any more hazardous than any other act he was called upon daily to perform in his duties as a railroad switchman; that he had frequently kicked couplings before with perfect safety, and that it was not unusual to do so in this character of work when it appeared necessary; that he did not use his hands, because it would not have been as safe as to use his foot, and that he did not consider it as an exceptionally hazardous undertaking; and that he was acting reasonably and prudently under the circumstances in undertaking to make the coupling with his foot instead of his hand. Plaintiff also testified that, shortly before the accident occurred, he had been instructed by the general superintendent for appellant that if he let cars get away again, he would lose his job, and that if he had failed to couple the cars in this instance, they would have gotten away and rolled down the hill to destruction; that in attempting to make the coupling as he did, he was using due care and caution to avoid any injury, and that he was using his best judgment to make the coupling without injury to himself in the short time in which he had to act; that he did not regard the undertaking to make the coupling, under the circumstances, as unusually dangerous or hazardous; and that the injury would not have occurred but for the twisted and defective knuckle and drawhead in appellant's car which he was attempting to couple to the standing car; and that in his employment as switchman there was always an element of risk, hazard, and danger in the work of coupling cars, either by hand or by the foot, but that in this instance there appeared to him no more danger than was usually incident to such service.

At the time the injury occurred there was no "concurrent negligence" statute in our state, and contributory negligence was a bar to recovery. The testimony offered by appellant in the court below was in conflict with the testimony offered by the appellee. The appellant's witnesses testified that, in their opinion, the coupling, under the circumstances, was a dangerous and hazardous undertaking, and also that there was a rule of the company prohibiting employees from making couplings in this manner. The plaintiff testified that he had no knowledge of any such rule, and that couplings were made frequently in the manner in which he made the one in question. With the above state of facts testified to in the lower court, the railroad company asked for, and was refused, a peremptory instruction to find for it; and it urges that the lower court committed error in not granting the peremptory instruction.

The defendant in the court below requested and was granted several instructions, in which the jury were told that if they believed the plaintiff had failed to take reasonable precautions for his own safety, and had failed to use ordinary care and diligence to avoid being injured, they should find a verdict for appellant; that if they believed the appellee, in using his foot to adjust the knuckle in question to make the coupling, was not exercising reasonable and ordinary care for his own safety, he could not recover; that the appellee could not recover if the jury believed that he was endeavoring to perform an obviously hazardous and dangerous thing in adjusting the knuckle with his foot; that appellee could not recover if they believed that no reasonably prudent man would have undertaken to adjust the coupling with his foot; that he could not recover if he was not using reasonable and ordinary care for his own safety, and such failure to do so either produced, or contributed as direct cause to produce, the injury complained of; and that the amount of care that plaintiff was required by law to exercise for his own

safety was increased if he had knowledge that the work in which he was engaged was dangerous and hazardous.

Taking the testimony of the plaintiff as a whole, we are of the opinion that the question of contributory negligence was a question of fact, and was properly submitted to the jury; and by their verdict they said that they did not believe that the plaintiff, under all the facts and circumstances, the time, place and conditions, was guilty of contributory negligence, but that he acted as a reasonably prudent person would have acted under the same circumstances.

The appellant contends that the appellee, being a yard-foreman switchman comes within the excepted class of employees under section 193 of the Constitution, which provides that:

“Knowledge by any employee injured, of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them.”

—and that therefore there can be no recovery here on account of the defective knuckle and drawhead of which appellee had knowledge. As to this contention, we hold, following the rule announced in *Railroad Co. v. Parker*, 88 Miss, 193, 40 So. 746, that there are only two classes of excepted employees under this section of the Constitution, and they are conductors and engineers.

Affirmed.

BOARD OF SUPERVISORS OF ADAMS COUNTY v. DALE.

[70 South. 828.]

1. TAXATION. Assessment. Reduction. Proceedings. Personal property. To whom assessable.

Under Code 1906, section 4312, so providing, where there is an overvaluation of property assessed known to be such and also a clerical error in the assessment rolls, the board of supervisors have the power at any time on the application of a party interested, to correct the assessment.

2. TAXATION. Personal property. To whom assessable.

Personal property belonging to an estate held in trust, should be assessed to the trustee in his representative capacity at his residence or domicile.

APPEAL from the circuit court of Adams county.

HON. ROBT. E. JACKSON, Judge.

Proceedings to abate an assessment by John Dale, trustee of the estate of Mary Ella Nutt, against the board of supervisors of Adams county. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

W. C. Bowman, for appellant.

Ernest E. Brown, for appellee.

SYKES, J., delivered the opinion of the court.

The appellee, John Dale, trustee, filed his petition with the board of supervisors of Adams county at the March term in 1914 to abate an assessment, appearing on the personal assessment rolls "on loans at a greater rate of interest than six per cent. per annum," of six thousand dollars against the estate of Mary Ella Nutt, which taxes were assessed against said estate by said board at its August meeting in 1913. The petition avers that said trustee at the time of his appointment, and has continuously ever since, resided and been a citizen of the state of Louisiana. Said petition further avers that the only

money loaned at a greater rate of interest than six per cent., in which said estate of which he was trustee had any interest at all, consisted of two notes, one for four thousand, three hundred and ninety nine dollars of Dr. Boger, and one of Dr. Dumas for one thousand, five hundred dollars, the total sum being five thousand, eight hundred and ninety-nine dollars; that the legal title to these notes is in the petitioner; that this assessment was an "overvaluation known to be such;" and that it was a "clerical error" also to make the assessment against the estate of Mary Ella Nutt, instead of against John Dale, trustee of the estate of Mary Ella Nutt. This petition was rejected and disallowed by the board of supervisors, and an appeal prosecuted to the circuit court of said county. Petitioner and the board of supervisors entered into an agreed statement of facts fully covering all phases of the case.

By consent of both parties, a jury was waived, and the case was tried on this agreement before the circuit judge, who granted the prayer of the petition and abated the assessment, from which order this appeal is here prosecuted.

The agreed statement of facts shows that in this case there was an "overvaluation known to be such" in the making of this assessment, and also there was made a "clerical error in the assessment rolls," which gave the board of supervisors the power at any time on the application of the party interested to grant the proper relief under section 4312 of the Code of 1906. *Simmons v. Scott County*, 68 Miss. 37, 8 So. 259; *Jennings v. Coahoma County*, 79 Miss. 523, 31 So. 107.

The personal property covered by this assessment should have been assessed to the trustee in his character as trustee at his residence or domicile. *Millsaps v. City of Jackson*, 78 Miss. 537, 30 So. 756.

For these reasons, the case is affirmed.

Affirmed.

WESTERN UNION TELEGRAPH CO. v. JENNINGS.

[70 South. 830.]

1. *TORTS. Actions. What law governs. Damages. Punitive damages.*
The law of the state where a tort occurs governs the right of action.
2. *DAMAGES. Punitive damages.*
In the state of Missouri, actual damages must have been sustained as a basis for the recovery of punitive damages, and in the absence of actual damages no punitive damages may be recovered.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by Henderson Jennings against the Western Union Telegraph Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Street & Street, for appellant.

J. B. Sullivan, for appellee.

SYKES, J., delivered the opinion of the court.

This is a suit for damages by the appellee, Henderson Jennings, against the Western Union Telegraph Company, based upon the following facts, viz.:

The appellee and another young man were given employment by the proper employee of the Western Union Telegraph Company at St. Louis, Mo., and were sent to Tipton, Mo., at a salary each of forty dollars a month. They were to work as linemen of the appellant company, but state that they were put to work digging holes which they did not consider proper work for linemen, and for this reason, after working two and one half days, they quit and went back to St. Louis, Mo., where the agent of the company who had employed

them, viz., one Mr. Sharp, lived. Shortly after their arrival in St. Louis the appellee called up, over the telephone, Mr. Sharp and stated to him that the foreman at Tipton, Mo., had not given them line work, but had put them to digging holes, and that for this reason they had quit. Appellee stated that Sharp replied: "If you and Foster cannot dig holes for the Western Union Telegraph Company, go and scratch for a job." Appellee then asked him what he meant, and Sharp replied: "If you and Foster can't dig holes for the Western Union Telegraph Company, go to hell." Suit was instituted in the circuit court of Simpson county for two thousand, five hundred dollars damages. No actual damages were proven. The jury returned a verdict for appellee for one hundred and fifty dollars, evidently assessed as punitive damages under the instructions.

The alleged tort upon which this cause of action is predicated occurred in the state of Missouri, and for this reason the law of that state governs as to whether or not the appellee has a cause of action. *Pullman Palace Car Co. v. Lawrence*, 74 Miss. 782, 22 So. 53.

In Missouri, actual damages must have been sustained as a basis for the recovery of punitive damages, and in the absence of any actual damages no punitive damages may be recovered.

The above rule is fully set forth in the case of *Hoagland v. Forest Park Highland Amusement Co.*, 170 Mo. 335, 70 S. W. 878, 94 Am. St. Rep. 740. From this decision we make the following quotation:

"It is claimed that the judgment should be reversed upon the ground that the jury by their verdict gave the plaintiff no compensatory damages, while they assessed in his favor punitive or exemplary damages. . . . It is held in 1 Sutherland on Damages (2d Ed.) section 406, and in *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. Rep. 543, *Stacy v. Portland Pub. Co.*, 68 Me. 279, *Freese v. Tripp*, 70 Ill. 499, *Marwell v. Kennedy*, 50 Wis. 648, 7 N. W. 657, *Jones v. Matthews*, 75 Tex. 1, 12 S. W. 823; *Trawick v.*

Martin Brown Co., 79 Tex. 460, 14 S. W. 564, *Schippel v. Norton*, 38 Kan. 567, 16 Pac. 804, *Kuhn v. Chicago, etc., R. R. Co.*, 74 Iowa, 137, 37 N. W. 116, and *Mills v. Taylor*, 85 Mo. App. 111, that actual damages must be found as a predicate for the recovery of exemplary damages. The verdict, therefore, seems to be inconsistent with itself, for when no actual damage has been sustained, as found by the jury in the case at bar, no exemplary damages can be allowed, nor can exemplary damages constitute the basis of a cause of action, for they are mere incidents to it, and when given they are not given upon any theory that the plaintiff has any just right to recover them, but are given only upon the theory that the defendant deserves punishment for his wrongful acts, and that it is proper for the public to impose them upon the defendant as punishment for such wrongful acts in the private action brought by the plaintiff for the recovery of the real and actual damages suffered by him. No right of action for exemplary damages, however, is ever given to any private individual who has suffered no real or actual damages. He has no right to maintain an action merely to inflict punishment upon some supposed wrongdoer. If he has no cause of action independent of a supposed right to recover exemplary damages, he has no cause of action at all."

We therefore hold that the appellee has failed to make out a cause of action, and for this reason the judgment of the lower court is reversed, and the case dismissed.

Reversed and dismissed

ILLINOIS CENT. R. CO. v. FIRST NAT. BANK OF MCCOMB CITY ET AL.

[70 South. 831.]

SET-OFF AND COUNTERCLAIMS. *Rights of assignee. Statute.*

Under our anti-commercial statute, Code 1906, section 4001, providing that all notes and other writings for the payment of money or other thing may be assigned by indorsement, and the assignee may maintain such action thereon in his own name as the assignor might have maintained and that in all actions on such writings defendant shall be allowed the benefit of all set-offs had against them previous to notice of assignment, where plaintiff railroad, in course of purchasing lumber under contract which required the seller to pay the freight to points on its line, had paid freight charges for the seller amounting to one thousand eight hundred and ninety-four dollars, and which owed the seller the purchase price of lumber amounting to two thousand nine hundred dollars; in such case the railroad, as against a bank standing in the position of an assignee of the invoices, after the seller's bankruptcy was entitled to set off such freight advances against the invoices since the bank at all times stood in the shoes of the seller.

APPEAL from the chancery court of Pike county.

HON. J. S. HICKS, Chancellor.

Bill by the Illinois Central Railroad Company against the First National Bank of McComb City and others, with answer and cross-bill by the defendant bank. From a decree for defendants, complainant appeals.

The facts are fully stated in the opinion of the court.

Mayes, Wells, May & Sanders and *R. V. Fletcher*, for appellant.

Green & Green and *Quin & Williams*, for appellee.

SYKES, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Pike county adverse to the appellant company upon the following statement of facts:

During the years 1908, 1909, and 1910, the W. C. Sutherland Lumber Company sold to the appellant railroad company a large number of carloads of lumber. The lumber was inspected by a representative of the appellant company and accepted by him before being loaded at the shipping point. The contract of sale, among other things, provided that the seller, W. C. Sutherland, was to pay the freight on the carloads of lumber to a point on appellant's line. All of the lumber involved in this controversy was purchased at points on connecting lines of the appellant company. The testimony in this case shows that on practically every invoice was printed or written, "Shipper pays all charges to I. C. Railroad Company line." The invoices also show the terms of payment. There is also written or printed on the face of these invoices the following, "Please send voucher to O. B. Quin, cashier First National Bank, McComb, Miss." The invoices were forwarded to the appellant company by appellee bank and were paid by the company issuing the vouchers as follows: "To W. C. Sutherland Lumber Company: Pay First National Bank of McComb City, Miss." The testimony shows that one voucher was often issued in payment of several carloads of lumber. Some of the invoices for the lumber showed on their faces that the amount of freight had been deducted; others were silent on this point. In no instance did the W. C. Sutherland Lumber Company prepay the freight charges. The connecting carrier would charge to the appellant railroad company the amount of freight due on these cars, and monthly settlements were had between the railroad companies, at which time the appellant railroad company settled for all of these freight charges on this lumber. Some time during the year 1910, the W. C. Sutherland Lumber Company failed, at which time it owed the appellant railroad company as freight charges paid on carloads of lumber the sum of about one thousand eight hundred and ninety-four dollars. At this time appellant railroad

company owed the W. C. Sutherland Company for the purchase price of fourteen or fifteen cars of lumber, amounting in round numbers to about two thousand nine hundred dollars. After the failure of the Sutherland Lumber Company, the First National Bank of McComb City notified the appellant railroad company that the bank held by assignment the invoices for these fourteen or fifteen carloads of lumber and demanded payment of same from the appellant railroad company. The appellant offered to pay this amount less the amount of freight charges owed to it by the Sutherland Lumber Company for all of the freight advanced on the lumber shipments during the entire time it had dealt with the W. C. Sutherland Lumber Company. The bank declined to settle on this basis, but offered to settle for the amount of the invoices less any freight charges due on these fourteen or fifteen cars of lumber. Several suits were instituted by the bank on different invoices for carloads of lumber, and other suits were filed against said lumber company by attachment, and still other parties were claiming an interest in the lumber contained in the said last fourteen cars. At this juncture appellant railroad company filed its bill in the chancery court of Pike county, alleging in substance the above facts, and asking that the court settle the equities of all the parties interested. The appellee bank filed an answer and cross-bill, claiming that the appellant railroad company was due it the amount of purchase price for these fourteen cars of lumber less any freight charges paid by the appellant on any of these fourteen cars. The chancellor entered a decree in accordance with the answer and cross-bill of the appellee bank. The facts are not disputed.

It is the contention of the appellee that, by the assignment of the invoices for the last fourteen cars of lumber shipped by the W. C. Sutherland Lumber Company to the appellant railroad company, the bank took the same free from any claims or set-offs for any bal-

ance due the appellant for freight on any previous shipments of lumber. It is the contention of the appellant that under our anti-commercial statute the appellant has the right to set-off against the assigned claim held by the bank this claim for freight paid by it on previous shipments of lumber. There appears nowhere in the record any written assignment of these invoices for lumber by Sutherland to the bank. There is a notation appearing on the face of each invoice, "Please send voucher to O. B. Quin, cashier First National Bank, McComb, Miss." The uncontroverted testimony shows that the railroad company acted upon this request and sent the vouchers to the First National Bank. It further shows, however, that the railroad company had no notice whatever that the bank claimed that any of these invoices had been assigned to it or that the bank made any claim whatever to the proceeds of any of this money, until after the failure of the W. C. Sutherland Lumber Company, at which time there was already due the appellant company all of the freight charges it claims as a set-off in this suit, and at which time there was also due either Sutherland or the bank the purchase price for these fourteen cars of lumber by the appellant railroad company. However, whether we treat each one of the transactions as an assignment of the invoices to the bank, or whether we treat it as a sale between appellant and the W. C. Sutherland Lumber Company and that the bank merely acted as the collecting agent, the rights of the parties in each instance are the same. The appellee bank certainly could not by assignment acquire the right to collect the purchase price on all of these shipments of lumber freed from the right of the railroad company to set off at any time against any or all of these claims whatever sum it had advanced for freight charges. These freight charges paid by the railroad company were necessary to be paid by any consignee before being allowed to get possession of its freight. The assignee of a chose in action of this char-

acter under our anti-commercial statute can never acquire the same free from any claims or set-offs against the assignor held or acquired previous to the notice of the assignment. And in this case, treating the direction of payment of the last fourteen cars as an assignment, the appellant railroad company had no notice of said assignment until long after it held and acquired the set-offs for the amount of freight previously paid by it on other shipments.

Section 4001, Code of 1906, which is determinative of this case, reads as follows:

"All promissory notes, and other writings for the payment of money or other thing, may be assigned by indorsement, whether the same be payable to order or assigns or not, and the assignee or indorsee may maintain such action thereon, in his own name, as the assignor or indorser could have maintained; and in all actions on such assigned promissory note, bill of exchange, or other writing for the payment of money or other thing, the defendant shall be allowed the benefit of all want of lawful consideration, failure of consideration, payments, discounts, and set-off made, had, or possessed against the same previous to notice of assignment in the same manner as though the suit had been brought by the payee; and the assignee or indorsee of any such instrument may maintain an action against the person or persons who may have indorsed the same, as in case of inland bills of exchange; but when any debt shall be lost by the negligence or default of an assignee or indorsee, the assignor shall not be liable on the assignment or indorsement. The assignee of a claim for the purchase money of land may enforce the vendor's lien as the vendor could."

It is impossible to separate the shipments of the last fourteen cars from the other shipments made by W. C. Sutherland to the appellant railroad company. All of the invoices for shipments from 1908 until the failure of the W. C. Sutherland Company were handled

110 Miss.]

Syllabus.

in practically the same way, and it is therefore necessary to consider all of them for a proper determination of this case. At no time during these transactions did the bank ever hold any claim against appellant freed of the set-offs or claims of appellant against Sutherland. The bank simply at all times stood in the shoes of Sutherland.

The lower court erred in not allowing all of the amounts of the freight claims to be set off against the amount due the appellee for purchase price on said fourteen cars.

Reversed and remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

SCOTTISH UNION & NATIONAL INS. CO. v. WYLIE.

[70 South. 835.]

1. INSURANCE. *Fire policies. Conditions. Defenses. Waiver. Payment of premiums.*

Where the duly authorized agent of a fire insurance company informed the owner of the property afterwards burned, that his policy had expired and was told to issue a policy for a given amount on the property and the agent replied that he could consider the insurance in effect from that minute, and the policy was later written but not delivered until after the fire at which time the premium was paid, and at the time the policy was written there was a chattel mortgage on the property and there was also another insurance policy on the property but no questions were asked or answered in regard to the same. In such case the agent waived the benefits of the noninsurance and the nonmortgage clauses existing in said policy at that time; or rather he had no right to insert these two clauses in said policy, because they were not a part of the contract of insurance entered into between

himself and the owner, that contract being simply that he was to issue a policy on the property for the named amount, regardless of any mortgage or any other insurance.

2. **SAME.**

In such case where loss occurred the owner could recover on the policy though the property was mortgaged and there was other insurance on the same.

3. **INSURANCE DEFENSE. Waiver. Payment of premiums.**

In such case, when the policy was not delivered nor the premium paid until after the fire and at the time of the payment of the premium the agent knew that there was a mortgage on the property and that the same was covered by other insurance, he waived the benefit of the noninsurance and nonmortgage clauses in the policy by the acceptance and retention of such premium.

APPEAL from the circuit court of Harrison county.

HON. J. I. BALLENGER, Judge.

Suit by N. F. Wylie against the Scottish Union & National Ins. Co. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

McLaurin & Armistead, for appellant.

Griffith & Wallace, for appellee.

SYKES, J., delivered the opinion of the court.

Suit was instituted in the circuit court of Harrison county by the appellee, Wylie, against the appellant insurance company upon a policy of insurance for the amount of seven hundred and fifty dollars, insurance on personal property used in the livery and undertaking business, and consisting of a hearse, carriages, wagons, etc. Under the instruction of the court the jury returned a verdict in favor of plaintiff and assessed his damages at seven hundred and nine dollars and eight cents. The facts in the case, briefly stated, are as follows:

On or about December 16, 1913, the appellee was informed by one Mr. Tomlinson, the agent of appellant com-

pany at Gulfport, Miss., that a policy which appellant held on the above-described property had expired. Appellee then told Mr. Tomlinson to issue a policy on the same property for seven hundred and fifty dollars, to which Tomlinson replied that he could consider the insurance in effect from that minute. The policy was later written by the said agent, but was kept in his office until after the fire, which occurred December 24th, and in which fire the appellee sustained a total loss of all property covered by this insurance, except two surreys and two sets of harness. The premium of thirty-seven dollars and fifty cents on the policy was not paid by the appellee until after the fire, or some time during the month of January. At the time the policy was written there was a chattel mortgage on the personal property, and there was also another insurance policy on the property for the sum of seven hundred and fifty dollars. At the time the premium on the policy was paid to the insurance agent, the testimony further shows that he had knowledge of both the other insurance and the chattel mortgage on said property. The premium was retained by the agent, and was not offered to be returned until the trial of said cause, or until the pleadings were filed.

It is the contention of appellant that a fraud was practiced upon the insurance company by the appellee in the procuring of this insurance, and for that reason the policy was void and a nullity, and that no subsequent waiver by the agent of the company could breathe life into a policy which was void from its inception. In support of this contention, appellant relies principally upon the case of *Insurance Co. v. Antram*, 86 Miss. 224, 38 So. 626. The facts in the instant case do not justify the contention of appellant. There were no false or fraudulent representations whatever made by the appellee to the agent of appellant at the time he instructed him to write this insurance. The facts show that the appellee was notified by the agent of appellant that his insurance had expired,

whereupon he told this agent to write him a policy for seven hundred and fifty dollars. No blank application for this insurance was given to the appellee to be made out. This being true, it follows that the agent of appellant, in making this contract, acted upon what information he already had as to the condition of the property and as to the condition of other insurance and mortgages upon the same. The testimony in the case shows that Tomlinson, as the agent of the appellant company, had the right to issue policies, collect the premiums therefor, cancel policies, and, in short, was their agent for all purposes connected with the insurance business in the city of Gulfport. The appellant company held him out as their agent, and they are bound by all his acts within the real and apparent scope of his authority. This being true, by his not asking for any information from the insured as to the condition of the policy or the condition of the property, he waived the benefits of the noninsurance and the nonmortgage clauses existing in said policy at that time; or rather he had no right to insert these two clauses in said policy, because they were not a part of the contract of insurance entered into between himself and the appellee—that contract simply being that he was to issue a policy on this property for seven hundred and fifty dollars regardless of any mortgages or any other insurance. The *Antram Case*, relied upon by appellant, simply decides this:

“If the assured made false statements to the agent of appellant, and thereby secured the issuance of a policy which, had the truth been stated, would not have been issued, the contract of assurance was never entered into, being absolutely vitiated by the fraud.”

In the instant case, however, no false or fraudulent representations—in fact, no representations whatever—were made by the insured. In the case of *Rosenstock, Ex'r v. Insurance Co.*, 82 Miss. 674, 35 So. 309, the policy recited that the insurance would be void if the interest of the assured had not been truly stated to the company, or if it was not truly stated in the policy, or if the assured

was not the sole and unconditional owner of the property described. The policy in that case had been delivered to and accepted by the insured. The facts developed that there had been a contract of sale of the property entered into, and a part of the consideration of same had been paid, of which the insurance company was ignorant. The court in that case held that the plaintiffs, by their silence and acceptance of the policy, agreed to the above terms; and for that reason the policy was void. In the case at bar, however, the policy was not delivered to the insured until after the fire; and he was not chargeable in any way with the terms contained in said policy. The case of *Insurance Co. v. O'Dom*, 100 Miss. 220, 56 So. 379, Ann. Cas. 1914A, 583, simply decides that under the facts in that case the cashier of a local office of the insurance company was a special agent of the company, who had no authority to waive any of the conditions printed in said policy. In the case at bar we are dealing with a general agent of an insurance company; and for this reason the *O'Dom Case* is not in point. In the case of *Rivara v. Insurance Co.*, 62 Miss., on page 728, this court said:

"An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured. His acts and declarations in reference to such business are the acts and declarations of the company. The company is bound, not only by notice to such agent, but by anything said or done by him in relation to the contract or risk, either before or after the contract is made."

To the same effect is *Insurance Company v. Sheffy*, 71 Miss. 919, 16 So. 307; also *Insurance Company v. Gibson*, 72 Miss. 58, 17 So. 13.

The case at bar is very similar to that of *Insurance Company v. Holmes*, 75 Miss. 390, 23 So. 183. In the *Holmes Case* the insured sent to the company's agent, who issued the policy, requesting him to send a blank form for application for insurance, and also to send a man to inspect the house on which the insurance was de-

sired. The agent did neither, but wrote the policy himself, just as was done in the instant case. He misdescribed the house, and destroyed that policy, and wrote a second one, which he sent to the appellee, who never read it, and who was in ignorance of the non mortgage clause in the same until his attention was called to it, after the fire and after the premium had been paid and accepted. The court in part in that case says (75 Miss. on page 402, 23 So. on page 184):

"This is a case, then, in which no application—no formal application—was made, because the agent held it unnecessary, inasmuch as he knew about the condition of the property, and a case in which appellee did not know there was any anti-mortgage clause contained in the policy until after the loss, and the question is whether the company shall now be permitted to repudiate its contract made, not upon any misrepresentations, or even representations, of the insured, but upon its own knowledge of the condition of the property. If this policy was issued upon the knowledge of the company as to the condition of the property, and after refusal to furnish the usual blank application, whereby the insured would have apprised the insurer of the true condition of the property, and not upon any representation of the insured, then the anti-mortgage clause must be held to have been waived. Any other view would involve the holding by us of this proposition: That the insurance company, waiving any application by the person desiring insurance and issuing a policy upon its own knowledge of the condition of the property, may receive the premiums paid for the indemnity, and defeat a recovery for a loss sustained by inserting in the policy a provision invalidating the contract from the moment it was signed and delivered, thus inducing the insured to rest upon a contract which the company never intended to carry out. This cannot be sound law."

The case at bar is a much stronger case against the insurance company than that above quoted, for the rea-

son that in this case there was never delivered or attempted to be delivered to the insured the policy of insurance. By the acceptance of the premium by the agent of the insurance company after the fire, when he had knowledge both of the mortgage on said property and of the other additional insurance upon the same, he waived all irregularities which might or could have existed, either in the issuance or during the continuation of said policy. In the case of *Insurance Company v. Smith*, 79 Miss. on page 144, 30 So. on page 363, this court said:

“A week after the fire, with full knowledge by the insurance company, through its special agent and adjuster, Mr. Alexander, of the existence of the mortgage, it received, through its local agent, Mr. Russell, the premium on the policy and held it. This fact carries the whole case shown by the record for the assignee of the insured, because it was a waiver of its defenses.”

The case of *Insurance Company v. Dobbins*, 81 Miss. 623, 33 So. 504, goes even further than the *Smith Case* in holding the insurance company estopped to set up a forfeiture of the insurance. In the *Dobbins Case*:

“The agent was paid the premium some time in the forenoon of October 25th, without knowledge at that time of the additional insurance; but six hours thereafter, on the same day, when there had been no change whatever in the condition of the parties, he was fully informed of the additional insurance. . . . After full knowledge on the 25th of the other insurance, the agent had another conversation with Dobbins, in which he told him that the policy had been forfeited on account of the additional insurance, but that he would report the matter to the company; and more than that, when Dobbins came to him to get blank proofs to make proofs of loss, he furnished them.”

On page 630 of 81 Miss., on page 506 of 33 So. the court says:

“Accepting, therefore, the correctness of the finding of fact by the learned circuit judge, to wit, that the agent did not know, at the very instant he received the premium, that there was other insurance, it follows, from the very acts and conduct of the agent, acting in those respects for the company, that the appellant is estopped to set up the forfeiture.”

We therefore conclude: (1) That it was the duty of the agent of the insurance company, in the absence of any request by him for information from the insured, to have informed himself as to the true condition of the property insured; that his acts in this respect are binding upon his principal, the insurance company; that, failing to do this, the insurance company had no right to insert in this policy the anti-mortgage clause and the anti-insurance clause, and that neither of said clauses forms a part of the contract of insurance; and (2) that by the acceptance of the premium by its agent after the fire, and after the agent had knowledge of the mortgage and of the additional insurance, then this was a waiver on the part of the insurance company of these two clauses in the contract.

Affirmed.

ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
MARCH TERM, 1916.

RESTER v. STATE.

[70 South. 881]

1. HOMICIDE. Instructions. Manslaughter. Evidence. Verdict. Appeal.
Harmless error. Condition of weapon.

Where on a trial for murder, the evidence for the state, if believed convicted the defendant of murder, if anything, and the evidence of the defendant, if believed, established a clear case of self-defense, it was error for the court to grant the state an instruction authorizing a verdict of manslaughter.

2. HOMICIDE. Verdict. Manslaughter. Evidence.

In such a case a verdict of manslaughter pursuant to such instructions, not being supported by the evidence, was error.

3. SAME.

In such case such instructions on manslaughter was not rendered harmless, because the verdict of manslaughter was favorable to accused.

4. HOMICIDE. Instructions. Manslaughter.

Where in a trial for murder the evidence for the state, if believed, convicted the defendant of murder, and the evidence for the defendant, if believed, established a clear case of self-defense, defendant was entitled to an instruction telling the jury expressly that they must either convict the defendant of murder or acquit.

5. HOMICIDE. Evidence. Condition of weapon.

In a trial for murder it was not error for the court to permit a witness for the state to testify that the rifle of deceased was on safety though several hours had elapsed since the shooting, when

the evidence disclosed that all parties left the scene of the homicide immediately after the shooting, without disturbing the body of deceased, and there was nothing in the evidence to indicate that any one approached the body of the deceased for examination or other purpose before the sheriff's posse arrived.

APPEAL from the circuit court of Pearl River county.
HON. N. E. WEATHERSBY, Judge.
Tom Rester was convicted of manslaughter and appeals.
The facts are fully stated in the opinion of the court.

Parker & Shivers, for appellant.

Lamar F. Easterling, Assistant Attorney-General, for the state.

STEVENS, J., delivered the opinion of the court.

Appellant, together with one Roy Davis, was indicted by the circuit court of Pearl River county for the murder of one Sol Ladner, tried and convicted of manslaughter. The homicide occurred August 28, 1914, on the public highway near the east end of a little bridge across "Alligator creek" seven or eight miles east of the town of Poplarville. It appears that on the day of the difficulty the deceased, in company with his relatives, R. Ladner and Aaron Ladner, had been fishing on Alligator creek from about eight o'clock in the morning to somewhere between twelve and one o'clock; the deceased being engaged in shooting fish on this occasion by the use of what is termed a high-pressure rifle that projects with great force a steel bullet, and his associates using the hook and line. The deceased had spent the preceding night with his uncle, R. Ladner, the principal state witness in this case, and this fishing party took with them that morning a quart of alcohol which they diluted to some extent with water and sugar, and which they drank freely during the forenoon. Appellant on the morning of the difficulty left his home in Poplarville, as he says, to go to the home of one Tom Lee to consummate a deal for a pair of mules. Appellant

took with him an automatic shotgun, and when in about a mile of the scene of the homicide he met with one Leroy Davis, who accompanied appellant on his journey. It is appellant's contention that he left his mule at the home of George Davis at the suggestion of Leroy and proceeded on foot in company with Leroy Davis in order that they might hunt turkeys as they went and came.

Bad blood existed between appellant and the deceased, and it appears that threats had been freely uttered by the deceased and communicated to appellant for a long time before the killing. This bitter feeling had existed to the extent that about a month prior to the killing the deceased, armed with a shotgun, waylaid appellant by stationing himself in a thick clump of what is known as gallberry bushes; but his presence and position were discovered by appellant, who, being also armed, threw his gun upon the deceased, and under the startling circumstances of this near tragedy discussed his trouble with deceased, and told him that, if he (deceased) would promise to go about his business and make no further demonstration and attempt to take the life of appellant, he (appellant) would not kill him or give him any trouble. There is evidence, however, that after both departed they gave conflicting versions of this near tragedy, some of the witnesses testifying that deceased stated the only reason he did not kill appellant on this occasion was that appellant was too quick for him, and other witnesses for the state testifying that appellant reported that the only reason he did not kill deceased was that his gun was tricky, and he was afraid to risk it. There is no evidence that appellant knew that the deceased was fishing on this creek the day of the homicide or that he expected to encounter the deceased on that occasion. The main state witness, R. Ladner, was a cousin of the deceased, the father-in-law of appellant, also distantly related by blood to appellant. One witness testifies that the deceased, familiarly referred to as "Uncle Sol," sought to induce one John Ladner to kill appellant together with one Davis. It appears further that the

younger Ladner, Aaron, who carried the wallet containing the fiery refreshment, was so badly intoxicated at the time of the shooting that he could not be used as a witness in this case. At the point where the bridge crosses Alligator creek, the creek runs north and south, and the public highway east and west. The fishing party had been up the creek that morning, and in returning, according to the testimony for the state, the two Ladners arrived at the bridge in advance of the deceased, and found appellant and his companion standing together at the east end of the bridge. The evidence is conflicting, however, on this point; appellant testifying that the two Ladners were already at the bridge when he and Mr. Davis arrived that far on their journey. R. Ladner, appellant, and Leroy Davis were engaged in conversation, when, according to the testimony of the only state witness attempting to detail the facts, appellant threw his gun quickly to his shoulder and fired five times as rapidly as he could shoot his automatic shotgun, which carries its cartridges in a magazine and expels the empty shells as it shoots. R. Ladner says, when appellant began firing, he was standing facing south and therefore had his back turned toward the direction in which appellant shot. He says he turned his head, however, and looked up the creek and saw the deceased sinking to the ground about twenty-six steps north and east of the creek; that immediately after appellant fired the five shots his companion, Roy Davis, took cover under a pine tree standing between him and the deceased and fired once upon the deceased, exclaiming at the same time, "I got him," or words to that effect; that thereupon the witness heard appellant working his gun, and he turned and saw appellant advancing several steps toward the deceased and fire twice more; that at that time deceased was prostrate and dying. This witness did not see the deceased at all at the time appellant commenced firing. The exact testimony on this point is as follows:

"Q. And you could not see behind you, of course? A. No, sir. Q. And you could not tell who was behind you,

and therefore you could not see Mr. Ladner? A. No, sir. Q. And you did not see him? A. No, sir."

This witness admits he had been drinking, but denies being drunk. There is some testimony to the effect that he was intoxicated several hours after the homicide.

Appellant took the witness stand in his own behalf; disclaimed any knowledge that he expected to meet the deceased on that day, denied being armed for the purpose of killing the deceased, claimed he and his companion were on a lawful journey to transact business and hunt turkeys, and contradicted some of the material statements of the state witness as to what happened at the time of the fatal encounter. He says he was sitting on the east side of the creek on a grassy knoll facing west when he suddenly beheld the deceased coming through the woods down the creek with his high power rifle, and that deceased, on seeing appellant, threw his rifle from his shoulder in a shooting position, when he (appellant) threw his shotgun to his left shoulder and began firing rapidly. His testimony, if believed, makes out a clear case of self-defense.

There was testimony on the part of the state from the sheriff and his deputy that they went to the scene of the homicide some four or five hours after the killing and found deceased lying with his head down the creek, his right hand near the trigger guard of his rifle, his left arm just to the left of the barrel, but the rifle was on safety. The defense objected to the statement of the sheriff that the rifle was on safety, for the reason that too great time had elapsed between the time of the shooting and the time the sheriff's posse arrived. This testimony was admitted over the objection of appellant. There is no testimony that the deceased ever fired his rifle.

Appellant attempts to justify the charge of the state witness that he fired upon the deceased after he was prostrate and dying by testifying that after the deceased fell to the ground he raised up on his knees, attempting to get his gun into action, and there is evidence to the effect

that some of the shot entering the chest of the deceased ranged or slanted downward. There is evidence that the back of the left hand and arm of the deceased was literally filled with shot, and the defense contends that these shot could not have entered the back of the hand and arm and in the pit of the arm unless the deceased had his gun in a shooting position, attempting to shoot from the right shoulder, as he was accustomed to do. All of the shot struck the deceased on the left side of his head and chest. Most of these shot were small shot, but a few of them were what is known as buckshot.

On the trial of the case the court, at the request of the district attorney, gave two instructions in reference to the charge of murder, and in addition gave the following instruction as to the verdicts it might return, to wit:

“First: ‘We, the jury, find the defendant guilty as charged in the indictment.’ In which event it will become the duty of the court to pronounce the death sentence against the defendant.

“Second: ‘We, the jury, find the defendant guilty as charged in the indictment, and certify that we are unable to agree as to his punishment.’ In which event it will become the duty of the court to sentence the defendant to the state penitentiary for his natural life.

“Third: ‘We, the jury, find the defendant guilty as charged in the indictment, and fix his punishment at imprisonment in the state penitentiary for his natural life.’ In which event it will become the duty of the court to sentence the defendant to the state penitentiary for his natural life.

“Fourth: ‘We, the jury, find the defendant guilty of manslaughter.’

“Fifth: ‘We, the jury, find the defendant not guilty.’”

The defendant asked no instruction with reference to manslaughter, but earnestly complains at the action of the trial court in granting the state the instruction authorizing the jury to return a verdict of manslaughter, and

complains of the verdict rendered in pursuance of this instruction.

The state's evidence, if believed, convicts the defendant of the crime of murder, if anything. The defendant's testimony, if believed, establishes a clear and unquestioned case of self-defense. As said by our court in similar cases, there is no middle ground. This is not a case where the jury, by believing certain portions of the state's evidence and certain portions of the defendant's evidence, can thereby weave out or make a case of manslaughter. This is a typical case where the defendant is guilty of unprovoked murder or he is innocent. It is the province of the jury to pass upon the facts of a case and to believe parts of the evidence of either side and discard any portion of the evidence either for the state or for the defendant. It is certainly the province of the jury also to settle any issue of fact in the case, but the defendant has the absolute right to have the facts of the case presented to the jury on instructions which state the law fully and accurately. The jury must apply the facts to the particular case in the light of, and in accordance with, the law of the case. If there is no element of manslaughter under the facts of the case, then there should be no instruction granted either to the state or to the defendant in reference to manslaughter. In the present case the defendant asked for no instruction on manslaughter, and the action of the court in authorizing the jury to return a verdict of manslaughter was error.

The verdict of the jury rendered in pursuance of this instruction and convicting the defendant of the crime of manslaughter is not supported by the evidence in the case and constitutes error.

It is contended, however, that even though the granting of this instruction is error, it is harmless error; that the verdict of the jury is favorable to the defendant, and under the ruling of this court in *Huston v. State*, 105 Miss. 413, 62 So. 421; the case should and must be affirmed. The announcement or ruling of the court in the *Huston Case*

was a new and radical departure from the previous holdings of our court. Our court, in *Virgil v. State*, 63 Miss. 320, *Parker v. State*, 102 Miss. 113, 58 So. 979, and numerous other cases, had condemned in unmistakable terms the returning of a verdict of manslaughter in a case of this kind, and the correctness of our decision in the *Huston Case* has been earnestly and repeatedly challenged by eminent counsel. The majority of the court as now constituted believe the *Huston Case* was and is wrong and should be overruled, and this court should turn to the holding of and readopt the decisions expressly overruled by the court in the *Huston Case*. We have given this subject careful consideration, and hereby overrule the *Huston Case*, and return to the safer and sounder principle well announced by Judge Cook in *Parker v. State*, *supra*. The court in that case uses this language which meets with our approval:

"The instruction authorizing the jury to convict the defendant of manslaughter was vicious in the extreme, when applied to a case like the one under review. There is no halfway ground here, no debatable question, except the defendant's guilt or innocence of the crime of murder. To advise the jury that they could compose their differences and doubts, if any they had, by finding the defendant guilty of a lesser crime, without evidence to support the verdict, is unfair to defendant and manifest error."

The crime of manslaughter in our state is defined by statute separately and apart from the statute defining murder, and there are different states of facts that constitute what might be termed different kinds of manslaughter. It has been the policy of our lawmakers as well as of the courts to recognize a marked difference between murder and manslaughter, and to provide different punishments therefor. The defendant in this case was entitled to an instruction eliminating from the consideration of the jury the crime of manslaughter and telling the jury expressly that they must find the defendant

guilty of murder or nothing. As stated by Judge Calhoun in *Johnson v. State*, 78 Miss. 627, 29 So. 515:

“To say to the jury, You ‘may find’ a verdict of guilty of manslaughter, would mean that they might properly so find, whereas there is absolutely nothing in the evidence to warrant such a finding.”

The court therefore, in granting the instruction authorizing the jury to return a verdict of manslaughter, initiated the error, and thereby, perhaps, led the jury into the serious error of returning an unauthorized verdict. In the present case the testimony of the defendant as to the demonstration made by the deceased at the time appellant began firing is not contradicted by the positive testimony of a single witness. The state is compelled to depend upon the use of a deadly weapon and other circumstances to show that appellant, and not the deceased, was the aggressor at the critical moment of the fatal encounter. The testimony of the accused as a witness in his own behalf cannot arbitrarily be discarded by the jury, and there is no fact or circumstance disclosed by the defendant's own testimony and no word uttered indicating that appellant was under the heat of passion or acted otherwise in a way indicating manslaughter. Our court is not alone in the holding announced in *Parker v. State*, *supra*, and a long line of well-reasoned cases decided by our court prior to the *Parker Case*. The same question is well treated by the case of *Bates v. State*, 4 Ga. App. 48, 61 S. E. 888. and other well-reasoned cases of the Georgia court. The court, speaking through Hill, C. J., in the *Bates Case*, says:

“If the evidence for the state was the truth, the verdict should have been for murder. . . . If the defendant's statement was the truth, the defendant should have been acquitted. . . . The charge on the law of voluntary manslaughter led the jury away from the consideration of the truth as it existed in the evidence, or from the truth as it existed in the prisoner's statement. and induced them to agree on a compromise verdict, without any evidence

whatever to support it. Therefore, following the repeated rulings of the supreme court and of this court, we are constrained to hold in this case that the law of voluntary manslaughter was improperly given in charge by the court, and that the verdict of the jury for this offense, being without evidence, must be set aside as contrary to law."

Likewise, in the case of *Flynn v. State*, 43 Tex. Cr. R. 407, 66 S. W. 551, the court of criminal appeals of Texas, through Henderson, J., says:

"Appellant's own evidence (and he is the only witness testifying on this point) states that he shot at deceased because he believed he was advancing on him to rob him. From either standpoint it cannot be claimed there was any negligence, because there was an intention to kill. We accordingly hold that the court erred in submitting the issue of negligent homicide at all, even if it be conceded that same was properly submitted in the charge, which is not the case here."

We refrain from discussing the evidence in detail. It is sufficient to say there is ample evidence of threats, of bitter feeling entertained by the deceased toward appellant, and the uncontradicted evidence reflects that appellant, to use a common expression, had the drop on the deceased at the time it appears deceased waylaid and might at that time have taken the life of the deceased, but deliberately refrained from doing so. The setting was such that the community would not be surprised to hear of either party having been killed.

We do not think any error was committed by the court in permitting the witness for the state to testify that the rifle of the deceased was on safety. It is true several hours had elapsed since the shooting, but the evidence discloses that all parties left the scene of the homicide immediately after the shooting without disturbing the body of the deceased, and there is nothing in the evidence to indicate that any one approached the body of the deceased for examination or other purpose before the sheriff's posse

arrived. Of course, defendant was privileged to rebut this testimony in any legitimate way.

While the law should be enforced, the liberty of defendants charged with crime should not be compromised by juries. We close this opinion with words borrowed from Judge Terral in the case of *Strickland v. State*, 81 Miss. 134, 32 So. 921:

“ . . . Whenever the life of a human being is in the balance, it is but just to him that the law governing the case made against him be properly stated to the jury.”

Reversed and remanded.

SMITH, C. J., dissenting.

Cook, J. (specially concurring). I concur in the judgment of the majority that this case should be reversed; but I think this case and the *Huston Case*, 105 Miss. 413, 62 So. 421, may be differentiated. The sole issue arising from the evidence in the *Huston Case* was the identity of the slayer; while in the present case Rester, the defendant, admitted that he killed the deceased. In the *Huston Case* the court, in its instruction to the jury, correctly define manslaughter; while in this case the court did not define manslaughter at all. In the *Huston Case* the jury reached the conclusion that Huston was the slayer of Harris, but by a misinterpretation of the court's instruction convicted Huston of manslaughter. There could have been no compromise on the facts in the *Huston Case*. Huston either killed Harris or he did not; there was no middle ground on this issue. The jury decided this issue against Huston, and erroneously, but to his benefit, labeled the crime manslaughter. By confining the *Huston Case* within the limit of its own facts, I think the decision was logically sound.

COON v. ROBINSON MERCANTILE CO.

[70 South. 884.]

CHATTEL MORTGAGE. *Payment and satisfaction. Nonpayment of unsecured debt.*

Under Code 1906, section 2781, providing that mortgagees or *cestui que trust* shall satisfy mortgages or deed of trust of record when the same has been fully paid, even though a creditor whose debt was secured by a deed of trust on crops raised by the mortgagor on rented lands, was liable for the rent, where the deed of trust did not cover the land, and crops to the value of the secured debt were delivered to the mortgagee with the landlord's consent, thus extinguishing the secured debt it was the duty of the mortgagee to enter satisfaction on the margin of the record of the trust deed.

APPEAL from the circuit court of Wilkinson County.

HON. R. E. JACKSON, Judge.

Suit by R. C. Coon against the Robinson Mercantile Company. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

W. F. Tucker, for appellant.

The conditions of the deed of trust were never broken, the account for advances was over paid, and the debt for agreed advances secured by the deed of trust was thereby discharged *pro tanto* and the deed of trust should have been canceled of record on the legal and written request of the appellant. *Ogden v. Harrison*, 56 Miss. 743; *Morgan v. Price*, 59 Miss. 210; *State v. Sullivan*, 80 Miss. 597; *Charter v. Stevenson*, Am. Dec. 45, 444; *Jones on Chattel Mortgages* (2 Ed.), sections 96 and 646, pp. 89 and 646.

The last request to cancel and satisfy the deed of trust was made on the 8th day of December, 1913, and there was no satisfaction entered on the record on the 29th day of January, 1914.

This suit was brought under section 2781, Code of 1906, the request on pages 12 and 13, of record complied with said statute, and the case was brought literally within the statute, and should have been at least submitted to the jury on the question of the payment of the account.

A. H. Jones, for appellee.

Plaintiff testified that he owed the rent to H. L. Coon; that H. L. Coon waived his rent; that he supposed it was waived, but he was not present at the time, but saw a waiver in October.

He admitted that he had not paid the rent even at the time of the trial, and he testified that Robinson told him that it was not right to turn over the deed in trust until the rent was paid.

Now then, with the plaintiff knowing, even in October, that the deed of trust would not be given him because the rents were not paid, and even after he had been informed in December that the deed of trust had been assigned to H. L. Coon, he brings this suit under section 2781 against the Robinson Mercantile Co., an assignor, after notice to him. He further knew in November that this rent had been paid by Robinson Mercantile Co. to H. L. Coon, and had been charged back to the plaintiff.

Even had the defendant canceled this deed of trust in October, or prior thereto, and was afterwards compelled to pay the rent to the landlord, under the landlord's lien, it would have had the right to recall the cancellation and to have enforced the deed in trust.

"One who receives cotton from a debtor and applies the proceeds thereof to the satisfaction of an existing indebtedness, and gives receipts therefor, if afterwards forced to pay such proceeds to one holding a paramount lien on the cotton, is not deprived of his right to de-

mand and enforce repayment from his debtor." *Ball v. Sledge*, 82 Miss. 749, 757.

There being no evidence of and waiver before the court and it clearly appearing that at the time of the notice to defendant to cancel the deed of trust it was not the owner of the instrument, nor indebtedness, and it fully appearing that the rent was not paid by plaintiff, the motion was properly sustained, the instruction properly given. There is no error in the case, and it should, I respectfully submit, be affirmed.

Cook, P. J., delivered the opinion of the court.

This suit was begun by appellant against appellee, under section 2781, Code 1906, to recover the penalty of fifty dollars, and damages, for failing and refusing to enter satisfaction on the margin of the record of a deed of trust. The record shows, without dispute, that appellant had paid to appellee all of the debt incurred by him, which was secured by the deed of trust, and that appellant had requested that the deed of trust be canceled. The deed of trust covered the crop raised by appellant on certain rented lands, the crops were delivered to the *cestui quie trust*, and their value credited to the secured debt extinguished same. Appellant had not paid the rent on the land, but the evidence in this record discloses that his landlord had waived the rent in favor of appellee. However, appellee claims here that it was liable for the rent, and, being so liable, it had charged the unpaid rent to appellant. If it be true that appellee will have to pay the rent, it nevertheless remains that the deed of trust does not cover the rent, and there was therefore no reason for appellee's failure to cancel the deed of trust.

The court erred in instructing the jury to find for the defendant.

Reversed and remanded.

COON v. PATTERSON.

[70 South. 885—71 South. 825.]

CHATTEL MORTGAGE. *Payment. Transfer. Effect.*

Where a tenant gave a trust deed upon his crop and stock to secure advances from a merchant and subsequently paid such advances, the trust deed was discharged and through the merchant paid part of the tenant's rent and transferred the trust deed to the landlord to enable him to collect the balance of his rent, it cannot be enforced for that purpose.

OPINION ON SUGGESTION OF ERROR.

Where a tenant of farm lands gave a deed of trust upon his crop and live stock to secure a merchant for supplies advanced and the account not being fully paid, the balance due was by agreement paid by the landlord, and the trust deed transferred to him, such trust deed was enforceable in the landlord's hands.

APPEAL from the circuit court of Wilkinson county.

HON. R. E. JACKSON, Judge.

Replevin by J. B. Patterson trustee against N C. Coon, from a judgment for plaintiff, defendant appeals. The facts are fully stated in the opinion of the court.

W. F. Tucker, for appellant.

A. H. Jones, for appellee.

Cook, J., delivered the opinion of the court.

This appeal is from a judgment entered by the circuit court in a replevin suit instituted by J. B. Patterson, trustee, in a certain deed of trust, to recover possession of certain live stock described in the deed of trust, and is a companion case to *R. C. Coon v. Robinson Mercantile Co.*, 70 So. 884. The indebtedness secured by the deed of trust is thus described by the instrument itself, viz.:

"Whereas, said party of the first part [R. C. Coon] expects said Robinson Mercantile Company to advance

him ninety dollars supplies and merchandise during the year 1913, and at such prices as may be agreed upon at the time of delivery, or the usual customary credit prices in the town of Centerville, Mississippi . . . and any further amounts that may be advanced as aforesaid and not mentioned herein."

The deed of trust conveyed to the trustee agricultural and horticultural products to be raised on land belonging to H. L. Coon. The advances made by the Robinson Mercantile Company were paid, but it appears that the Robinson Mercantile Company afterwards paid to H. L. Coon, the landlord of R. C. Coon, the rent on the land on which the agricultural and horticultural products were grown, and transferred and assigned the deed of trust of H. L. Coon, and this action of replevin was begun by the trustee in the deed of trust. Why the deed of trust was transferred to the landlord is not entirely clear, unless it was for the purpose of affording to the landlord a means by which he could collect that part of his rent which Robinson Mercantile Company had not paid him. It appears that the landlord had entered into an agreement with Robinson Mercantile Company to waive a part of the rent, and this suit in replevin was brought to secure the payment of the unpaid balance. It may be that we have not guessed the theory of appellee; but, whatever may be his theory, we are clearly of opinion that the deed of trust does not cover the rent, and, the record disclosing that R. C. Coon, appellant, had paid all of the debt secured by the deed of trust, that the trustee was not entitled to the possession of the live stock replevied. The court below erred in awarding the possession of the property to appellee.

Reversed, and judgment here for the value of the property in favor of appellant, with six per cent. interest thereon from the date of the levy of the writ of replevin.

Reversed and judgment here.

OPINION ON SUGGESTION OF ERROR.

A re-examination of the record of this appeal leads to the conclusion that we did not understand the facts presented to the trial court. In our former opinion reversing the trial court, we said:

“Why the deed of trust was transferred to the landlord is not entirely clear, unless it was for the purpose of affording the landlord a means by which he could collect that part of his rent which Robinson Mercantile Company had not paid.”

We see now that this was a misconception of the facts. The deed of trust, according to appellee's evidence, was to secure the advancements made by the Robinson Mercantile Company. This account was not paid in full, and the balance due was, by agreement, charged to the landlord and the security transferred to him. Evidently, we confused the waiver of a part of the rent with the payment by the landlord of the balance of the account secured by the deed of trust.

Former judgment reversing this case is set aside, and the judgment of the trial court is affirmed.

Affirmed.

WM. R. MOORE DRY GOODS Co. v. AINSWORTH ET AL.

[70 South. 885.]

1. BILLS AND NOTES. *Validity. Fraud.*

When the agent of plaintiff acting in good faith promised the defendant further credit and an extension of time, in order to secure their signatures to notes for a preexisting debt, the fact that plaintiff later refused to extend the credit promised was not such a fraud as invalidated the notes.

110 Miss.—45

2. SAME.

IN such case the failure of the plaintiff to allow further credit was but a partial failure of consideration and defense to an action on the notes only in the nature of a set-off to the extent of actual loss caused by the failure of plaintiff to carry out the obligation to extend further credit.

APPEAL from the circuit court of Simpson county.

HON. W. H. HUGHES, Judge.

Suit by William R. Moore Dry Goods Company against W. C. Ainsworth and others. From a judgment for defendants, plaintiff appealed.

The facts are fully stated in the opinion of the court.

Watkins & Watkins, for appellant.

It is very true that where fraudulent representations of fact have induced the entering into a contract, these fraudulent representations may be shown in order to show that no contract was ever entered into, or in fact, existed, which is the well settled rule in Mississippi, and everywhere else, so far as we know. The only trouble about the contention is that the promises alleged to have been made by appellant's special agent, Hudson, were merely promissory statements, and not representations, of existing facts, and, therefore, do not fall within the rule stated by counsel for the appellee.

The case of *Wren v. Hoffman*, 41 Miss. 616, is not an authority in favor of the appellee, but supports the appellant's contention. The rule for which we contend, that, in order that a fraudulent statement of facts may avoid a contract, there must be more than a mere promissory warranty, is supported by all the authorities.

In 20 Cyc. page 20, the following rule is announced: "Promissory statements. (A) In general, as a general rule, false representations upon which fraud may be predicated must be of existing facts, or facts which previously existed, and cannot consist of mere promises or conjectures as to future acts or events, although such

promises are subsequently broken, unless the promise includes a misrepresentation of existing facts, or the statement as to some matter peculiarly within the speaker's knowledge, and he makes the statement as a fact. Whether a false statement or intention may be actionable, appears not to be definitely settled. On the one hand, it is held that, although it is difficult to prove what the state of a man's mind is at a particular time, yet if it can be ascertained, it is as much a fact as anything else; and thus that a statement of intention is a statement of fact, and if it is false and accompanied by the necessary elements of actionable fraud, it may constitute grounds for an action of deceit. On the other hand, it is held that a statement of intention is merely a promissory statement, and therefore, is not actionable, although false."

It is well settled that a mere breach of a promissory warranty cannot be construed into a fraudulent statement of fact so as to avoid a contract.

J. P. Edwards, for appellee.

We contend that if Mr. Hudson held out such inducements to the defendants to execute these notes, and by such inducements procured their signatures to the notes, that such was clearly a fraud, and that it makes no difference whether Mr. Hudson was a special or a general agent of plaintiff the note having been so procured is null and void. We do not think it could be seriously contended that plaintiff could accept that part of the contract which inured to his advantage and repudiate those that were to the advantage of the defendants simply because the note was procured by a special agent; that those things that were fraudulently done were beyond his authority while those very acts were the reason that procured the notes. Plaintiff must endorse all the acts of Mr. Hudson in and about procuring the settlement of the account by notes or none.

"Fraud vitiates every contract into which it enters, and where it evinces that plaintiff is not entitled to recover anything because of its existence, it is properly cognizable in a court of law. *Brewer v. Harris*, 2 S. & M. 84.

Counsel contended that Harrison had paid some of the notes executed under such conditions, but all the testimony denies this, and even if he had done so, this would not have validated the notes that were unpaid and obtained through fraud. "All contracts, the execution of which has been obtained by fraudulent representations, are void and cannot be subject to waiver. *American Cent. Insurance Co. v. Antram*, 86 Miss. 224, 38 So. 626.

"Fraud vitiates everything and may be predicated of promises designed to entrap the unwary and never intended to be kept as well as of misstatement of facts." *Patten-Worsham Drug Co. v. Planters Mercantile Co.*, 86 Miss. 423, 38 So. 209.

It seems to be the contention of counsel for plaintiff, that if Mr. Hudson was a special agent, and that he perpetrated a fraud in the procurement of the note in settlement of the account, and that this was done without the knowledge or ratification of the plaintiff, then plaintiff would not be bound by such acts of his special agent. On this point we beg to quote the following from this court: "A person innocent himself of fraud, cannot hold property, or an advantage gained for him by the fraud of another." *Planters Bank v. Neely*, 7 How. 80.

Counsel seems to get the idea that the defense set up in this case and the testimony offered and allowed by the court violates the well-settled rule that oral evidence is inadmissible to vary the terms of a written contract. The plea nor the testimony attempts nothing of the kind. It can always and under all circumstances be shown by oral evidence that a contract was procured by fraud or that the same was never legally executed as

was held by this court in the case of *Howie Bros. v. Walter Prat Co.*, 83 Miss. 15, 35 So. 216.

In the above cited case the following is the language of Chief Justice Whitfield: "It is said in *Wren v. Hoffman*, 41 Miss. 620, that parol evidence may be admitted to show that the instrument is altogether void, or that it never had any legal existence or binding force, either by reason of fraud, or for want of due execution and delivery. This qualification of the rule applies to all contracts. The court's ruling in admitting the testimony showing that the contract was procured by fraud was therefore correct. It is one thing to attempt to vary, alter, or contradict the terms of a written contract once validly executed, and quite a different thing to show that the contract offered never had any legal existence, because its execution was procured by fraud."

On the vital point, that is as to the representations made by Hudson, and that these representations induced the defendants to execute the notes, there is absolutely no conflicts as will be seen by the evidence.

POTTER, J., delivered the opinion of the court.

The appellant, William R. Moore Dry Goods Company, a mercantile corporation of Memphis, Tenn., was plaintiff in the trial court, and filed its declaration in the circuit court of Simpson county against W. O. Ainsworth, H. K. Ainsworth, and L. E. Robinson, appellees, upon two promissory notes, indorsed by them for one Mrs. E. J. Harrison in the sum of two hundred dollars each, dated February 26, 1912, and maturing November 1, 1912. The defense to this action, set up by the way of special plea, was that the signatures of the defendants to the notes were obtained by the fraud of the appellant, through its agents and representatives, in that E. J. Harrison, the principal in said notes, was indebted to the appellant for goods, wares, and merchandise previously bought of the appellant, and this said

indebtedness was past due, and that appellant's agent, one Hudson, promised Mrs. Harrison, if she would execute notes for the indebtedness above mentioned, that his principal, the William R. Moore Dry Goods Company, would extend to the firm of E. J. Harrison & Co., at a future date, on demand, further credit in the sum of five hundred dollars, and, acting on the faith of this promise, the notes were executed and the indorsers signed same; and it is alleged that about thirty days afterward appellee ordered goods from appellant to the extent of three hundred and fifty dollars or four hundred dollars, and that in violation of this agreement appellant refused to ship the goods and extend the credit above mentioned as promised, on account of the bad financial condition of the community. This is relied upon as a complete defense in bar of this action.

The appellant demurred to the above plea, and the demurrer was overruled, and thereupon the case was tried; and although the appellant denied the agency of its representative in the matter of making the contract mentioned, and testified that the agent was a special agent, and only had conferred upon him the authority to collect this particular account and to take notes therefor, the court below gave a peremptory instruction in favor of the defendant. It is true that the appellees in this case testified that they only signed the notes in question because of the promise to extend a new line of credit for five hundred dollars to the firm of E. J. Harrison & Co., yet it is clear that Mrs. E. J. Harrison owed the debt for which the notes were given, which indebtedness was past due at the time the notes were executed, and that she obtained a long extension of time for the payment of the indebtedness she then owed, and that the notes in question only represented this indebtedness. It is clear that one consideration for the execution of the notes was the extension of the time of payment. At the most, therefore, there was only a partial failure of consideration on the part of appellant.

Although fraud is charged in the plea in reference to the alleged promise to extend this line of credit, yet there is no evidence to show that, at the time the appellant is said to have made the promise, it was not acting in good faith, and there is no testimony to substantiate the plea of fraud. At the most, in this case a partial failure of consideration, in that the appellant failed to carry out his promise to extend credit to the extent of five hundred dollars to appellee Harrison, has been shown. Where there is a partial failure of consideration, such failure is only a defense *pro tanto* to the obligation. In other words, if the defendants could show that to the extent of a certain amount in dollars and cents they had been damaged by the failure on the part of the plaintiff to carry out his alleged obligation, they would only be entitled to a set-off to this extent. This is the rule laid down in 3 Ruling Case Law, 945, and the authorities cited thereunder.

In this case, however, nothing except nominal damages are shown, because of the failure of the appellant to extend the five hundred dollar line of credit alleged to have been promised by the appellant to Mrs. Harrison. If the appellees had alleged in their pleadings that at the time the goods in question were ordered the market was lower, and afterwards Mrs. Harrison was forced to buy the same goods at a higher price, and the differences in price had been shown, the notes probably would have been entitled to a credit to the extent of the difference; but no such plea was made, and no such proof offered. There is absolutely no showing that the appellees were in any way damaged by the failure of the appellant to extend the credit which they say was promised.

The appellant, plaintiff in the court below, was entitled to the peremptory instruction requested for the face of the notes, with interest at the rate of eight per cent. per annum, and ten per cent. of the principal and interest as attorney's fees. Therefore appellant will have

judgment here for each of said notes of two hundred dollars and interest thereon at the rate of eight per cent. per annum from November 1, 1912, and ten per cent. of the total amount of principal and interest as an attorney's fee, and, in addition thereto, costs in this court and in the court below.

Reversed, and judgment here for appellant as above indicated.

Reversed.

ILLINOIS CENT. R. CO. v. PEEL.

[70 South. 887.]

1. DEPOSITIONS. *Admissibility. Carriers. Carriage of live stock. Evidence.*

Depositions taken without any notice whatever having been given to the defendant or its attorneys should not have been received in evidence.

2. CARRIERS. *Carriage of live stock. Evidence.*

Proof that cattle were shipped in good condition when they started and that on arrival at destination one was found dead and another so badly injured that it died shortly afterwards will not alone establish negligence on the part of the carrier.

APPEAL from the circuit court of Copiah county.

HON. J. B. HOLDEN, Judge.

Suit by L. G. Peel against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Mayes, Wells, May & Sanders, for appellant.

The rule of liability announced by this court is set forth in the leading case, of *L. N. O. & T. Ry. Co. v. Bigger*, 66 Miss. 319. That was a case in which B. F. Bigger shipped from Memphis, Tennessee, over appellant's railroad, a lot of mules to be delivered at Greenville, Mississippi, and the suit was brought by him to recover damages for injury to one of the mules by having its hoof torn off by reason of which it was rendered valueless. The proof showed that the mules were loaded in two ordinary stock cars at Memphis; the cars were shown to be in good condition and were such as are in common used by railroads for transportation of live stock. There was no positive or direct evidence of any negligence on the part of the defendant company of any of the cattle or that the cattle were delayed in shipment, or any omission of duty in reference to the stock. The plaintiff however, testified that the mules were all sound when they were loaded on the cars at Memphis; that they were loaded at eight o'clock at night; that while the train containing the cars was being switched, it was run into by a switch engine and considerably delayed and that there was some jarring of the train during the switching. The agent of the plaintiff, who received the mules at Greenville, testified that he noticed at the time they were loaded, that one of the mules was lame and that soon afterward it was discovered that one of them had its hoof torn off.

Chief Justice Arnold delivered the opinion of the court, and in the course thereof, used the following language:

"It is not shown how the hoof of the mule was torn off or whether it was done on the train or after it left the train, but it does appear that the car in which the mule was carried was suitable, the track was in good condition; that the equipment and appliances on the train were adequate; there was no culpable delay in transit and there was no fault, negligence or want of care in any respect, on the part of the carrier or its employees, in handling the stock or in the running or management of the train.

Under these circumstances, the carrier is not liable for the injury of the mule, which may have been self inflicted, or caused by the other mules in the car, if indeed the injury occurred on the train." He further states the rule of law to be as follows:

"Animals, when being transported in a manner contrary to their habits and instincts, may injure or destroy themselves or each other, notwithstanding every reasonable precaution which may be used to prevent it. For such occurrences, the carrier is not answerable. He is relieved from the responsibilities or casualties of this description, if he shows that he has provided suitable means for transportation, and exercised that degree of care which the nature of the property requires."

"In case the mules are injured while being carried by the railroad company, a recovery therefore cannot be had, if it appear that the train met with no accident, was properly handled, and the car was suitably and properly equipped, then the peremptory instruction for the carrier should be given, even though the witnesses testified to opinions that the animals were so crowded in the car that they could not have injured themselves.

And further in the body of the opinion, Chief Justice Wood says as follows: "As to one of the mules for which recovery was had, there is utter absence of any evidence that it received any injury on the train while being transported from St. Louis to Lexington. . . . But if it be conceded that the evidence warranted the jury in finding that this mule was injured on the train as was the case with the other mule which was sorely disabled when taken from the car, still on all the evidence in the case the railroad company was not liable. How the animals were hurt or by what means, nowhere appears."

And again: "But common observation and experience of mankind at all familiar with the capacity for gymnastics on the part of this hybrid, warn us not to place reliance on mere opinions of witnesses on this point. If they did not inflict the injuries on themselves, how

were they inflicted? Speculation however, is profitless, for if the railroad company exercised reasonable care in transporting the animals, no liability attached to it, and we have seen that this burden was conclusively borne by the railroad. The peremptory instruction asked by the appellant should have been given." We therefore submit that on the testimony in this case the plaintiff wholly failed to make out a case of liability against the defendant, and this being true, the peremptory instruction should have been given.

McNeil & Loeb, for appellee.

This is an appeal from a judgment assessing one hundred dollars damages for negligence in handling a shipment of stock from Hazelhurst, Mississippi, to St. Louis, Missouri.

The case originated in the court of A. W. Russell, Justice of the Peace, at Hazelhurst, and comes here from the circuit court of Copiah county. This judgment is predicated upon the testimony of plaintiff who showed that the stock were loaded at Hazelhurst in good condition, and the testimony, by deposition of one W. E. McKee, of St. Louis, who testified to the bad condition of the stock upon delivery to consignee; one steer was dead in the car on arrival and another died the following day from bruises.

No testimony was offered by the defendant.

The sole question presented by the record is: Should defendant's motion to suppress have been sustained?

POTTER, J., delivered the opinion of the court.

In the trial of this case in the circuit court, the deposition of a witness, W. E. McKee, was introduced and admitted as evidence over the objection of the defendant. The suit was for damages for the injury and death of two steers shipped over appellant's railroad, with other cattle, to St. Louis, Mo., and alleged to have been injured by

the carrier to such extent that they died from the injuries. The plaintiff did not attempt to prove by any other witness, except McKee, that the cattle were injured; therefore his testimony was not only material, but absolutely necessary to establish the plaintiff's case. It appears from the record that the above deposition was taken without any notice of any character ever having been given to the defendant or its attorneys. No opportunity to submit cross-interrogatories appears to have been given the defendant; in fact, in so far as the record shows, the deposition was entirely *ex parte*. It was error, therefore, to admit same over the objection of the defendant.

In addition to this, we think the testimony in this case is insufficient. The testimony shows that the cattle were shipped in first-class condition from Hazelhurst, and that on arrival in St. Louis one head was dead and another crippled, and died before it could be sold. There is no testimony to show that the dead steer died from injuries of any sort; nor is there any testimony of the extent of the injuries the crippled steer suffered, or the nature of same; nor did any witness testify that its injuries were such as would have likely produced death. This is the only testimony with reference to the injuries of the cattle in the case.

Reversed and remanded.

HARRISON COUNTY v. HURST.
SAME v. CURTIS.

[70 South. 889.]

1. REWARDS. *Sufficiency of services. Arrest and detention in another state. Construction of statute.*

In an action by plaintiff against a county for the statutory reward of one hundred dollars for arresting a fleeing homicide, where plaintiff had initiated the search in the nighttime and was on

his way to arrest the fleeing homicide some nine miles from the scene of killing and did make the arrest and the prisoner was afterward convicted, the fact that he was joined in the search by an officer to whom he turned over the prisoner after he had arrested him and who assisted him in handcuffing the prisoner, did not prevent plaintiff from being entitled to the reward.

2. REWARDS. Performance of service. Arrest in another state.

When plaintiff arrested a fleeing homicide in another state and notified the sheriff of the county in Mississippi where the homicide occurred of such arrest, and held the prisoner until the sheriff arrived, when he turned the prisoner over to him and the sheriff brought him back for trial, the fact that he so delivered the prisoner and did not incur any expense in returning him to the state did not destroy his right to the statutory penalty for arresting a fleeing homicide.

3. REWARD. Construction of statute.

The statute providing for a reward for arresting a fleeing homicide must be given a liberal construction in aid of parties making such arrest.

APPEAL from the circuit court of Harrison county.

HON. J. I. BALLENGER, Judge.

Suit by T. J. Hurst and L. E. Curtis against Harrison county for statutory reward. From a judgment for plaintiff, defendant appealed.

The facts are fully stated in the opinion of the court.

W. G. Evans and R. C. Cowan, for appellant.

We submit that under the facts of this case the appellee, L. E. Curtis, is not entitled to the statutory reward provided by section 1459, Code 1906. That the delivery up for trial in this case was not such a delivery up for trial as is contemplated by the statute. To be entitled to a reward, the person claiming same, must not only arrest the fleeing homicide, but he must deliver him up for trial in the county where the homicide occurred. *Gould v. Chickasaw County*, 85 Miss. 123. In that case as in the case at the bar the fleeing homicide was arrested in another state; the fact of the arrest was made known to the sheriff of Harrison county by a

telegram; the sheriff went to Alabama for the fugitive, and brought him to Harrison county, Mississippi, for trial. We take it that the law intends that the reward of one hundred dollars should not be all award, but should cover the expense and service of delivering the fugitive up for trial. In this case by the failure of L. E. Curtis to deliver Sidney Payne up for trial, the county was forced to bear the expense of sending for and delivering him up for trial.

We contend that Curtis did not comply with the statute and is not entitled to the reward.

Virgie & Virgie, for appellee.

The facts were agreed upon in the court below and there was no dispute but what Curtis made the arrest and the one arrested was the person who did the killing and that he was at the time fleeing and that he was brought back and took his sentence for manslaughter.

The only question before the court is, whether or not he was properly delivered up for trial, under section 1459 of the Code, to entitle the appellee to the reward. Appellee as shown by the agreed statement of facts, arrested Sidney Payne, who was the fugitive, in Montgomery, Alabama, and notified the sheriff of Harrison county, Mississippi, who went after Payne and brought him back to Harrison county, with the above result. So the only question for the court to decide is, was he delivered up for trial under section 1459.

Gould v. Chickasaw County, 85 Miss. 123, is against appellee's contention, but we respectfully submit that in that case the statute was improperly construed and that a strict construction was placed on the statute instead of a liberal one, which under the laws should be placed on such a statute.

The statute reads in part: "shall deliver him up for trial." In the case above referred to of *Gould v. Chickasaw County*, the court held that the fugitive had to be

delivered up in the county where the homicide occurred. This holding was in effect placing in the statute something that is not in there. The statute does not say where he shall be delivered up or to whom, but only that there shall be a delivery up for trial, and the purpose of the statute is evidently to reward the vigilance of any person who has captured any one who has killed another and is fleeing and has placed such fugitive in the custody of the law. When Payne was delivered up by appellee to the proper authorities of Harrison county he was brought back by the sheriff and was tried. Hence, there was a delivery up for trial. The natural effect of delivering one charged with crime to the sheriff of the proper county under the proper authority is a delivery for trial, because it is then the duty of the sheriff to confine the one charged with crime or to release him under bond according to law to appear for the purpose of standing his trial; and this statute was intended to cover just such cases.

Of course, the case of *Gould v. Chickasha County*, was properly decided under the facts of that case on the other point involved, to wit: That the person claiming the reward in that case was a sheriff in Arkansas and under the Arkansas statute it was made the duty of the sheriff to arrest any one charged with crime, and therefore in that particular case he was not entitled to the reward because of the law in Arkansas, and, while the court decided it on both points, we submit that in the respect that it held that the sheriff could not recover the reward because it was not a proper delivery up the opinion is erroneous and ought to be overruled.

This statute has received several constructions, one of which is in the case of *Ex parte Chas. Webb*, 96 Miss. 8, in which Whitfield, C. J., said that this statute should be liberally construed and in aid of the parties making the arrest, but that due care should be exercised to see that claims are *bona fide*, and overruled the cases.

(*Tate County v. Moore*, 87 Miss. 245; *Warren County v. Lanier*, 87 Miss. 606), on the manner in which these rewards should be allowed.

In the last two cases cited, it was held that the procedure to recover the reward was by separate allowance of the board of supervisors and of the circuit court and that the refusal of the board of supervisors operated to defeat the recovery and that the circuit court was powerless to overrule the decision of the board of supervisors.

The court held, in *Ex Parte Webb*, *supra*, that this construction was too strict and that those two cases should be overruled.

In the instant case there is no question but what the claim was a *bona fide* one, and appellee had gone to an expense of about thirty dollars in effecting the arrest of Payne; and to hold that he should be deprived of the reward because he did not himself bring Payne into Harrison county but delivered him to the sheriff of Harrison county under the proper authority in Alabama would be a denial of justice.

STEVENS, J., delivered the opinion of the court.

The appeal in each of these cases is from the judgment of the circuit court of Harrison county awarding appellees each the statutory reward of one hundred dollars for the arrest of a fleeing homicide. The claim of Mr. Hurst to this award and his right of recovery were denied and challenged by the board of supervisors, for the reason that at the time he arrested the negro, who had committed murder, he was accompanied by Mr. Duckworth, the regular deputy sheriff of the county. It is contended by counsel for appellant that the presence of the officer characterized appellee as a special deputy assisting the regular officer of the law in making the arrest. We have examined the facts, and find that the circuit court was justified in believing that Mr

Hurst initiated the search and was on his way to make the arrest when he was joined by the regular officer, and in finding that appellee in truth and in fact did make the arrest and deliver up the prisoner to Mr. Duckworth in accordance with the statute. The party arrested was tried and convicted. He evidently had run nine miles from the scene of the homicide, and circumstances at the time of the arrest indicate an effort to escape. The bare fact, therefore, that Mr. Duckworth, the regular deputy sheriff, joined in the search and assisted appellee in handcuffing the negro after Mr. Hurst had arrested him, should not deprive appellee from a recovery. He went upon his own initiative in the darkness of night, and voluntarily exposed himself to the danger incident to such arrest.

It is contended that Mr. Curtis should not recover because he did not deliver up the prisoner in accordance with the statute. The facts are that Mr. Curtis arrested one Sidney Payne, a fleeing homicide, in Alabama, and thereupon notified the regular sheriff of Harrison county, Miss., of the arrest, and held the prisoner until the sheriff arrived in Alabama, when he turned the prisoner over to the regular sheriff to be brought back to Mississippi for trial. It is contended that the statute imposed upon Mr. Curtis the duty and expense of bringing the fugitive back to Mississippi and delivering him to the authorities of Harrison county. We cannot give to the statute such a strict and narrow construction. It is conceded that the party arrested was under indictment for murder, and was a fugitive from justice, and was arrested and held by appellee until the sheriff of Harrison county arrived. There was no duty imposed upon the appellee to make the arrest, as was the case in *Gould v. Chickasaw County*, 85 Miss. 123, 37 So. 710. There is a statement in the opinion rendered by the court in the Gould Case that seems to justify the contention of appellant in the present case; but the truth is the opinion was controlled by the fact that the claimant in

that case was the regular sheriff of his county, and, as such, not entitled to any reward whatever. A requisition from the governor is usually necessary in transferring from another state and bringing back into our borders a prisoner charged with murder, and the request for this requisition should come from the lawful authorities of our own state. When appellee delivered up the prisoner to the sheriff of Harrison county, he made delivery to the proper person, and satisfied the evident purpose of the statute.

There is not the slightest evidence of collusion in either of these cases, and the statute, as said by Whitfield, C. J., in *Ex parte Webb*, 96 Miss. 8, 49 So. 567, "must be given a liberal construction in aid of parties arresting fleeing homicides."

Affirmed.

RUSSELL ET AL. v. ALLEN.

[70 South. 890.]

1. GARNISHMENT. *Liability of plaintiff to third persons claiming the fund. Garnishee's suggestion of another's ownership. Effect. Collateral attack. Lien on judgment. Vendor and purchaser. Vendor's lien. Notes. Maturity. Action.*

Where a wife with her husband sold land for cash and purchase money notes, and the husband assigned his interest in the notes to his wife, and a judgment creditor of the husband garnisheed the purchaser of the land and collected money on his judgment, in such case the wife had no claims against the judgment creditor for any amount he had collected by such garnishment, as there was no privity of contract between the wife and the judgment creditor, and there was no allegation in the bill or proof that the purchaser would be rendered insolvent by paying any part of the garnisheed debt.

2. GARNISHEE'S SUGGESTION OF ANOTHER'S OWNERSHIP. *Effect.*

In such case it was the duty of the garnishee, the wife being one of the payees in the note, to suggest the wife's ownership, and thereby place the law court in a position to implead the wife and the judgment creditor as provided in Code 1906, section 2355, and where the garnishee failed to do this, the law court could render no judgment, except against the garnishee and in favor of the judgment creditor.

3. SAME.

In such case in the absence of a plea by the garnishee that the judgment against the husband, a copayee, was void for lack of service, the wife had no right to collaterally attack the judgment recovered by her husband's creditor against her husband and the maker of the note as garnishee.

4. GARNISHMENT. *Lien on judgment. Right of debtor's wife.*

The wife of a debtor, who is with him copayee on notes, has no lien upon money recovered by a creditor of the husband against the maker of the notes in a garnishment proceeding and if the garnishee makes an unauthorized payment to the creditor of the husband, she is not concluded thereby.

5. VENDOR AND PURCHASER. *Vendor's lien notes. Maturity. Action.*

The wife, a copayee with her husband of defendant's lien notes which had not matured when she filed a bill to enjoin the maker as garnishee, from payment to a judgment creditor of her husband, had no right to an attorney's fee provided by the purchase money notes.

APPEAL from the chancery court of Lawrence county.

HON. R. E. SHEEHY, Chancellor.

Bill by Mrs. Mary E. Allen against J. A. Russell and another. From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

J. C. Oakes, for appellant.

G. W. Magee, for appellee.

STEVENS, J., delivered the opinion of the court.

Appellants prosecute this appeal from a decree rendered against them by the chancery court of Lawrence

county. It appears that appellee and her husband, J. C. Allen, sold and conveyed to William May, one of the appellants, in January, 1909, their home place for five hundred dollars, one hundred dollars cash, and the balance of the purchase money evidenced by four promissory notes, due respectively on or before December 1, 1909, 1910, 1911, and 1912; a vendor's lien being expressly retained in the deed to secure the purchase money. In March, 1909, appellant J. W. A. Russell recovered a judgment against J. C. Allen, the husband of appellee, in the justice of the peace court, and in April following garnishment was issued on this judgment and served on William May. The garnishee answered, admitting the indebtedness to J. C. Allen evidenced by the four notes and accrued interest, and judgment was rendered by the lower court in favor of Russell and against May as garnishee, with a stay of execution until the several notes matured. In November, 1909, Mrs. Allen, appellee, filed her bill in the chancery court alleging that the several promissory notes executed by May in favor of J. C. Allen and herself jointly had been transferred and assigned February 20, 1909, by her husband to her, that she was then the sole owner of the notes and the indebtedness secured thereby, and that the answer of William May as garnishee was fraudulent and wrong, and praying that Russell, the judgment creditor, be made a party to her bill and enjoined from receiving the proceeds of her notes, and that William May be enjoined from paying the money to Russell, and praying general relief in the premises. Separate answers were filed by the defendants denying Mrs. Allen's ownership of the notes, denying any fraud, but admitting the execution and delivery of the notes by William May. The defendant Russell pleaded his judgment against J. C. Allen for two hundred and seventy six dollars and fifteen cents, with interest and costs, and his judgment against William May as garnishee, and admitted the collection from William May of the first note for one hundred and nine dollars. William May admitted in his answer

the service of the writ of garnishment upon him, the filing of his answer as garnishee, but denied that he knew that J. C. Allen had transferred the notes to his wife, denied that the place he purchased from them was their home place, and denied any knowledge that the name of appellee appeared as one of the copayees of the notes, admitted paying the first note, and expressed a willingness to pay the balance of the notes as the court might direct. Oral testimony was taken, and upon the pleadings and proof the chancellor entered a decree in favor of appellee for the full amount of the three notes maturing in 1909, 1910, and 1911, with interest and attorney's fees, and rendered this as a joint and several judgment against both of the appellants, awarded a lien against the lands purchased by May, gave the defendants thirty days in which to pay the judgment, and condemned the lands to be sold by a commissioner of the court in event the personal decree so awarded was not paid within the time allowed.

The bill of complaint in this case was filed before any of the notes had matured. There was some contention by the appellee that the personal judgment recovered by Mr. Russell against J. C. Allen was void for lack of proper service of process on the defendant.

The deed of conveyance executed by J. C. and Mrs. Allen has the following express stipulation:

"It is also distinctly understood and agreed by the parties hereto that, if the grantee herein, William May, fails to meet any of the said payments when due, then the said grantee may pay the interest on same and take up said note at the expiration of the other."

The separate answers of each of the defendants were filed January 13, 1910, just after the first note became due and payable by its terms, but at the time of the rendition of the final decree, January 27, 1913, the first three notes had matured. -

It appears to be the theory of the bill presented by the appellee that the complainants had a right to a temporary injunction restraining Mr. Russell from collecting and

William May from paying the judgment rendered against May as garnishee, but the bill does pray that complainants be awarded a decree for so many of the notes as may be due and payable at the time the suit is tried.

We are unable to see how the bill of complaint in this cause states any case whatever against Mr. Russell. Conceding that the husband of appellee did transfer and assign his interest in the notes to her, and that she was sole, legal, and equitable owner of the notes at the time the bill was filed, still she has no claim against Mr. Russell, and certainly was not entitled to a personal decree against Russell for any amount he had collected under and by virtue of his judgment against William May as garnishee. There is no privity of contract between complainant and Russell, and not even an allegation in the bill or any proof indicating that the negro, William May, would be rendered insolvent by paying Mr. Russell any part of the judgment in garnishment.

There was no cross-bill by the defendant William May asking for any relief whatever against Mr. Russell, and therefore the relief granted to complainant was not in response to any cross-action undertaking to relieve William May from the judgment rendered by the lower court against him. The name of appellee appeared as one of the co-payees of the notes, and it was the duty of William May, as garnishee, to suggest the claim or ownership of appellee and thereby place the law court in a position to implead appellee and Russell. Without a suggestion from the garnishee even the law court would have been without jurisdiction to determine the right of Mrs. Allen to any portion of the indebtedness admitted to be due by the garnishee. *Porter v. West*, 64 Miss. 548, 8 So. 207. Our statutes provide a full and adequate relief where the fund is claimed by a third person and the statutory procedure should be followed. Section 2355, Code of 1906, grants the right to the garnishee to compel interpleader even after judgment has been rendered against him "if he had no such notice before the judgment was rendered."

If the garnishee fails, after due notice of the rights of a claimant, to suggest ownership or claim of ownership by any third party, then the law court is, of course, powerless to render any judgment, except against the garnishee and in favor of the judgment creditor. So far as this record discloses, the law court was justified in rendering a judgment in favor of Russell and against William May as garnishee.

There was no plea by the garnishee that the judgment which Russell had obtained against J. C. Allen was void for lack of service, and Mrs. Allen as complainant in the present cause had no right to make a collateral attack upon the judgment recovered by Mr. Russell against her husband. So far as this record shows, Russell has asked for and received nothing more than the law allowed him. It cannot be said that Mrs. Allen has a lien upon any money which he has recovered from William May on his judgment. If William May has made an unauthorized payment to Russell, then Mrs. Allen is not bound or concluded by such payment, and her rights are in no wise affected thereby. She still has her claim against William May and her lien upon the lands purchased by him.

As we view this record, appellee, as complainant, had no right to the injunction prayed for, and, indeed, no injunction was ever granted by the court. If she had no right to the injunction, then she is in the attitude of filing suit against William May before any of her notes had matured. It is true that at the time the final decree was rendered three of the notes had matured, but ordinarily the cause of a complainant must be determined as of the time the bill was filed, and, measured by this rule, complainant had no right to a personal decree whatever in this case, and especially to any attorney's fees provided for by the notes. We are conscious of the fact that no point is expressly raised or argued by counsel for appellants that the notes had not matured, but the theory of the bill was wrong to start with, and this has led the court into a series of errors. Among other errors, the rec-

Brief for appellant.

[110 Miss.]

ord fails to show the exact amount paid by William May to Russell.

The final decree having been based upon an erroneous conception of complainants' right in the premises, and, the whole record being in such confusion, we, constrained by a desire to do no injustice to any of the parties, feel that the decree of the court below should be reversed and set aside as to both appellants, and this cause remanded. If the parties can then amend their pleadings so as to entitle any of them to relief, the chancellor will be at liberty to proceed in accordance with equity and right.

Reversed and remanded.

CLARK v. SMITH.

[70 South. 897.]

GUARDIAN AND WARD. *Removal. Grounds.*

Where the guardian of the estate of a minor has been convicted of embezzlement in the circuit court, the chancellor is warranted in removing him without investigating into the merits of the conviction, notwithstanding he has appealed his case to the supreme court and given a *supersedeas* bond.

APPEAL from the chancery court of Claiborne county.

HON. R. W. CUTRER, Chancellor.

Petition by Mrs. Leila Smith against John Clark for his removal as guardian. From a decree of removal, the guardian appeals.

The facts are fully stated in the opinion of the court.

R. B. Anderson and J. T. Drake, for appellant.

There was only the conviction upon which the chancellor could have by any possibility acted, and we again urge

that this conviction was not in force when the order of removal was entered. It had been superseded under section 62 of the Code, and had no existing effect; furthermore he had been admitted to bail, and was at liberty. The state of facts differed in no material way from what it would have been had he been merely indicted. He might be convicted on an indictment; he might be acquitted; an appeal might result in an affirmance; on the other hand there might be a reversal. The conviction was not in force; the sentence was stayed, and the conviction superseded.

What is a *supersedeas*? It is defined as follows in 2 Cyc., page 885: "In modern times, the term is often used synonymously with a stay of proceedings, and is employed to designate the effect of an act or proceeding which of itself suspends the enforcement of a judgment."

Again: "A writ of *supersedeas* is an auxilliary process, designed to supersede the enforcement of the court below."

An appeal under section 62 is therefore a *supersedeas*; the conviction stands suspended, and is of no present effect; it is effective only when an affirmance shall have been had, and in this case there was reversal.

The citation from Wigmore, section 2579, does not uphold the position taken by appellee; we quote from that very section: "However, for reasons of convenience, where controversy is unlikely and the expense of a copy would be disproportionate, courts are often found taking notice of the tenor and effect of some part of a judicial proceeding without requiring formal evidence."

Further, this supreme court, in the case of *Y. & M. V. R. R. Co. v. Adams*, 85 Miss. 772, took judicial notice of the findings of the state railroad commission; if it then took notice of the findings of an inferior tribunal, it should certainly now take notice of the act which it has done itself.

The argument is that the ward's interest might suffer, but there can be no reason to think so. On the other

hand, Clark's rights are undoubtedly invaded by the decree removing him, provided he was not guilty, and there can be then no final adjudication of his guilt; and has not been as yet. In fact his appeal was sustained, and his position approved by this court as to the validity of the conviction.

Ben. W. L. Bedford, for appellee.

Section 2407, Mississippi Code of 1906, authorizes the chancery court to remove a guardian "for sufficient cause." The statute does not define "sufficient cause" and it is a matter, therefore, left to the sound discretion of the chancellor. It is too well settled for argument that where matters are left to the sound discretion of the trial court, like a finding of fact, the findings of the trial court will not be disturbed on appeal, unless the finding was manifestly wrong or unless it appears that the discretion has been abused. *Coffee v. Coffee* (Miss.), 24 So. 532; *Moyse et al. v. Howie* (Miss.), 53 So. 402; *Interstate Etc. Co. v. Lapsley* (Miss.), 24 So. 532; *Stevens v. Magee*, 81 Miss. 644; *Derdeyn v. Donovan*, Id. 696; *Clifton v. Clark et al.*, 84 Miss. 795; *Gross v. Jones*, 89 Miss. 44.

Now then, was the chancellor manifestly wrong or did he abuse his discretion when he found that the conviction of a cashier of a bank, in which his wards' funds had been deposited by him and were then on deposit, on a charge of embezzlement from that bank, was "sufficient cause" for the removal of the guardian? Counsel for the appellant, in his brief, seems to lay more or less stress upon the fact that, since the order removing the appellant as guardian and pending this appeal, this court has reversed the circuit court of Claiborne county, in the conviction of appellant on said charge and has remanded his case for another trial. The case at bar is before this court, of course, on review and not for a trial *de novo*. But even if it were, this court could not take judicial notice of the reversal in the criminal case: *Wigmore on Evid.*, sec. 2579.

Counsel seems to confuse "judicial notice" and "knowledge of one or more of the justices." The appellant has no copyright on the name "John W. Clark;" there might have been three or four of them convicted of embezzling the funds of the Bank of Hermanville. This court will, therefore, disregard the alleged reversal of the said conviction and consider simply whether or not the chancellor was manifestly wrong or abused his discretion in ordering the removal of appellant, as such guardian. If the chancellor was correct then, for the purposes of this appeal, he is correct now. If the appellant had even been proven innocent, it could not have any bearing here. As presented to the chancellor, the appellant had been found guilty and had been sentenced to five years in the penitentiary. It behooved the appellant to be shaping up his personal affairs to be ready for an enforced absence of five years and he could hardly be expected to give the minors' business that care and attention, pending his appeal, that said business would require.

Leaving out of consideration all turpitude that has attached to appellant by the conviction of embezzlement, his confinement renders him unable to attend to his own business. Section 2436, Code of 1906, provides for the appointment of a guardian for the estate of any convict, sentenced to the penitentiary for a year or longer. Certainly, the chancellor was not manifestly wrong when he declined to gamble on a future decision of this court. The jealousy with which the chancery court guards the estates of minors is inconsistent with any such chance taking. The estates of the minors could not suffer by the removal of the guardian; they might seriously suffer by his retention pending his appeal on the criminal charge. Upon an affirmance of the sentence, he would have at once, been confined in the penitentiary, there to remain for five years. Would not the chancellor have been taking a chance with the minors' estate to have done otherwise than remove the appellant?

The fact of the guardian's conviction was of itself and alone, sufficient to, not only authorize the chancellor to remove him, but make it his imperative duty.

POTTER, J., delivered the opinion of the court.

On petition of Mrs. Mary Smith, the mother of J. D. Millsaps, W. W. Millsaps, and Chas. Jackson Millsaps, minors, their guardian, John W. Clark, was removed as guardian of their property. The ground upon which the chancellor removed Mr. Clark as guardian for the above minors was that Mr. Clark had been convicted of a charge of embezzlement by the circuit court of Claiborne county. He had appealed from this conviction, had been granted bail, and a *supersedeas* of the judgment and sentence granted him.

It is the contention of appellant that, in view of the fact Mr. Clark had appealed his case, and that the appeal stayed the execution, and was granted bail, the chancellor erred in his finding, and that his removal was not a proper exercise of discretion; and especially is it urged that this court ought to take that view because this court has reversed and remanded the criminal case against Clark. In determining whether or not the chancellor erred in this instance in the exercise of the discretion confided in him to remove guardians, we will consider this case in the same light and with the same facts before us that the chancellor had before him.

The guardian in this case had been convicted on a charge of embezzlement, by a court of competent jurisdiction, and sentenced to a term in the state penitentiary. Having in view the interests of the wards, it occurs to us that it was not incumbent upon the chancellor to inquire into the correctness of the findings of the circuit court. The conviction in the circuit court in a felony case, especially when the charge against the guardian is embezzlement of funds, is, in our opinion, sufficient ground for the exercise of the chancellor's discretion in removing a guardian.

The judgment of the chancellor is therefore affirmed.

Affirmed.

110 Miss.]

Brief for appellee.

HARRISON COUNTY v. MCCALED.

[70 South. 899.]

STATUTORY REWARDS. *Fleeing homicide.*

Where a negro employee in a wholesale grocery company got into a controversy with and cut another negro to death and the other negro employees surrounded him and demanded that he give up his knife and the slayer backed to an entrance and refused this demand, when claimant, one of the white bosses, appeared and ordered the slayer to give up his knife and go to a dressing room, take off his working clothes and stay there until an officer came, all of which the slayer did, in such case claimant was not entitled to the statutory reward for arresting a fleeing homicide.

APPEAL from circuit court of Harrison county.

HON J. I. BALLENGER, Judge.

Claim by N. B. McCaleb against Harrison county, which was declined by the board of supervisors and the claimant appealed to the circuit court. From a judgment there for claimant, the county appealed.

The facts are fully stated in the opinion of the court.

R. C. Cowan and W. G. Evans, for appellant.

From the facts in this case we fail to see that John Johnson was fleeing or attempting to flee, or that appellee arrested and delivered him up for trial, and surely, unless those two conditions are shown, appellee would not be entitled to the reward. The facts in this case do not make out any stronger case than *Oktibbeha Co. v. Cottrell*, 70 Miss. 117, or in some particulars, *Monroe Co. v. Bell*, 18 So. 121.

Rucks Yerger, for appellee.

Considering all the facts it seems clear that this case should be affirmed.

The judge of the court heard all of the evidence; could see the demeanor and the character of the witnesses on the

stand, and after full consideration gave his opinion that Mr. McCaleb was entitled to the reward. This decision should not be reversed unless he was flagrantly wrong.

The purposes of the act allowing a reward of one hundred dollars for the arrest of a fleeing homicide are to encourage citizens to make these arrests and prevent escapes before the officers can arrive on the scene and the acts should be so construed as to carry out the purposes for which they are enacted and this court has in its several decisions construing this section, so held.

STEVENS, J., delivered the opinion of the court.

Harrison county denied the claim of appellee to the statutory reward of one hundred dollars for the alleged arrest and delivery up of one John Johnson, a fleeing homicide. Exceptions were reserved to the action of the board in denying the claim, an appeal prosecuted to the circuit court, and a judgment was entered by the circuit court reversing the findings of the board, and in favor of appellee. There were two claims presented for this reward, one by B. L. Conn, a police officer, and the other by appellee. There is considerable testimony in the case and some sharp conflict in the evidence. We have examined the testimony favorable to appellee, however, and, in our judgment, the facts fail to show that John Johnson was making a real effort to escape at the time Mr. McCaleb ordered him to give up his knife, go to the dressing room, and change his clothes. Without setting out all the facts in detail, it is shown by the testimony of appellee himself that Johnson was one of the regular negro employees of the Gulfport Grocery Company; that he made an unexpected assault on, and cut to death, one of the other negroes; that in this large wholesale house a crowd of negroes surrounded the assailant and demanded that he give up his open knife; that Johnson was backing back toward the side or back entrance of the large establishment followed by a bunch of negroes and declining to give up his knife, when Mr. McCaleb, the appellee herein, and

one of John Johnson's "bosses," happened along and demanded of the negro that he give up his knife, and this the negro immediately and obediently proceeded to do. Mr. McCaleb then asked the negro to go to the dressing room and take off his working clothes, telling him he could not leave until an officer came. The negro obeyed the direction of his superior, and in a few minutes a police officer of Gulfport arrived on the scene and took the prisoner in charge. No time had elapsed between the killing and the time Mr. McCaleb appeared on the scene, and the negro had not left the scene of the homicide or the building in which the difficulty occurred. The evidence does not justify the conclusion, therefore that the prisoner was attempting to flee. While the evidence reflects the good citizenship of Mr. McCaleb, and his actions under the circumstances of this case are to be commended, yet he did what most any of the white employees of the Gulfport Grocery Company would naturally be expected to do—stop the controversy between John Johnson and the crowd of negroes demanding the surrender of his knife, and thereby prevent further trouble and place the accused safety in the hands of the lawful authorities. It follows from the views here expressed that the judgment of the circuit court should be set aside, and the claim of appellee dismissed.

Reversed, and judgment here for appellant.

Reversed.

THRASHER v. HUMPHREYS ET AL.

[70 South. 900.]

WILLS. Constructions. Interest devised. Money on hand.

When a testator after making specific bequest, devised all the residue of his property to his wife and provided that in case he should have more than three thousand dollars in money on hand

Brief for appellant.

[110 Miss.]

at the time of his death two bequests of one thousand dollars each should be paid, otherwise all money on hand should pass to his wife, a demand note to which was attached an agreement that it should not be paid until the end of the season, was not money on hand and where the testator in such case did not have on deposit or in his possession more than three thousand dollars at the time of his death, the conditional bequest will fail and his wife will take all.

APPEAL from the chancery court of Claiborne county.
HON. R. W. CUTRER, Chancellor.

Petitions by Mrs. Martha J. Thrasher, executrix, against Mrs. Bettie B. Humphreys and another to construe a will. From a judgment for defendant, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Mayes & Mayes, for appellant.

Mr. Cason, as we have shown above, has set forth very fully the understanding with Judge Thrasher about his five thousand dollar dividend money, and he has shown that it was Judge Thrasher's understanding that the company was to reserve that money until the close of the season, and pay six per cent. interest thereon. Now, the appellees' cross-examination of witnesses in the court below rather indicates that counsel was stressing somewhat a matter of legal obligation. But the legal obligation of this situation has nothing to do with the real question. The real question is, what was Judge Thrasher's intention in the use of the expression which he did use? Even if it were true that the terms of the letter by which the note was transmitted to him would constitute an effort to vary the obligation of a written instrument which ran, "on demand," yet, nevertheless, that is a matter of no moment. The question is what Judge Thrasher understood, and what Judge Thrasher intended to do; and there is no evidence in this case whatever that he intended otherwise or ever attempted to do, otherwise, than to stand by and carry out exactly

the agreement which he made with Mr. Cason. He would have a right in July to call for his money. He did not. He let the company keep it on as an interest-bearing note, and that note was on hand when his will was written, and when he died. The interest was running, and interest does not run on money in hand. Looking to these facts, we submit that the decree of the chancellor below was erroneous, and should be reversed.

In support of our views, we submit the following authorities: *Carter v. Cox*, 44 Miss. 155; *Beck v. McGillis* (N. Y.), 9 Barb. 35, 60; *In re Price Will*, 169 Pa. 189; *In re Levy's estate*, 161 Pa. 189; *Mann v. Mann*, 14 Johns. 1; *Hancock v. Lyon*, 67 N. H. 216; *Smith v. Burch*, 2 Hun (N. Y.), 331; *Byron v. Landreath* (L. R.) 16 Eq. 475; *Collins v. Collins* (L. R.), 16 Eq. 455; *Dabney v. Cottrell*, 9 Grat. (Va.), 572; *Dillard v. Dillard*, 97 Va. 434.

E. S. & J. T. Drake, for appellant.

The one question before the court is whether the testator intended by the phrase "money on hand" to pass money on hand and in bank or whether he intended it to mean a promissory note, in his wife's possession, and designated by him for her use, as well.

The first question for investigation is as to the nature of the note. It is, first of all, payable to "order," not to bearer. It bears interest from date; it is not a deferred dividend though called that in the letter accompanying it, but a loan; the dividend had been declared, and was due and payable, but the secretary, and manager anticipating tight money persuaded the stockholders to let the corporation "use" this money, for the coming season. Lastly it is not a demand note, but a note due at the close of the season, about March 1, 1914, or a little later. The note on its face is demand, but the letter accompanying it, qualifies this feature expressly and stipulates that it was not to be collectible until the

close of the season. The letter and note form the whole contract and are to be construed together; see; 1 Greenleaf on Evidence, page 380; *Doe v. Bernard*, 7 S. & M. 322; *Millsaps v. Bank*, 71 Miss. 361.

So far as we have been able to ascertain, there is no authority holding that a note payable to order, even on demand, is even passed by the phrase "money on hand" but we are calling the court's attention to the above as it makes it even more clear that the testator could no thave intended to pass this note, knowing as he did, that it was not due for months, and having, further, set it aside for another purpose.

We have gone over the authorities as fully as our facilities permit, and find many cases where the phrase "money on hand;" "cash;" "money by me," and similar expressions are used; none of them hold, so far as we can find, that a note payable to order passes by any such phrase, though the word "money" without the qualifying words "on hand" has been most liberally construed where the context requires such construction.

Out of the large number of authorities bearing upon the question, and supporting our view, we cite the court to but three, viz.: Roper on Legacies, sec. 282; *Levy's Estate*, 28 Atl. 1068; *Hancock v. Lyon*, 26 Atl. 638.

J. McMartin and R. B. Anderson, for appellees.

The word money in its strict sense, means cash on hand or on deposit. The "word, though, is notoriously used in a much wider, more indefinite, and elastic" sense, and it may have any meaning which the testamentary intent, as manifested by the will, read in the "light of proper evidence imparts to it, such as personal property" in general, money due, reversionary interests in personalty, ground rents, bonds and notes, unsatisfied judgments, and even the "entire personal & real property of the testator." *Shelby v. Shelby* (Ky.), 8 Dana, 60; *Matter of Hendrickson*, 140 N. Y. App.

Div. —; *Apple v. Allen*, 56 N. C. 120; *Dickson's Estate & Pa. Dist.* 699; *Copia's Estate*, 5 Hila. (Pa.) 214; *Decker v. Decker*, 121 Ill. 341; *Jenkins v. Fowler*, 63 N. H. 244; *Sweet v. Burnett*, 136 N. Y. 204; *Jacob's Estate*, 9 Pa. Co. Ct. 40; *Above Affirmed*, 140 Pa. St. 268.

Mrs. Jacobs, at the time of her death, was seized to nearly as much real estate as personal. After giving several pecuniary legacies, and one or more specific legacies, she disposed of her residuary estate as follows: "The remainder and residue of my money I give and bequeath to the Hospital for the protestant church in Philadelphia." "There is no mention of real estate in the will, which may be accounted for by the fact, before stated, that when she executed it she owned none, nor did she for some years thereafter."

"There are two funds for distribution—one arising from conversion of the personal property, and the other from the sale of the real estate. The latter was claimed for the heirs at law, upon the ground that it did not pass by the will and that as to such real estate the testatrix died intestate. It is further to be observed that at the time the will was made she had sufficient personal estate to pay all the legacies, but that by reason of her purchase of the real estate her personal estate was so much diminished that it will only pay about fifty per cent of such legacies."

Says the court, see *Estate of Jacobs*, 23 Am. St. Rep. 231, 232: "What then," did the testatrix intend by the residuary bequest of "the remainder and residue of my money?" The word money literally means cash; and, if we adopt this interpretation, nothing passed by this clause. It was conceded, however, that this word was the equivalent of property. It was conceded "by the appellant that it included only money securities," and, perhaps, "other personal estate." That the word "money" is popularly known and used as indicating property of every description is well known. Thus it

is very common to refer to a person as a "moneyed man" because of his large "possessions." It appears very plain to us that this testatrix used the word "money" in its popular sense, as the equivalent of property, and that "she intended all her estate to pass by the residuary clause." She knew "of what her estate consisted when she made her will."

Money is a generic term, and covers every thing which, by consent, is made to "represent property." *Crutchfield v. Robins*, 42 Am. Dec. 417 & note. A general residuary clause includes any property or interests of "the testator not already disposed of." *Riker v. Cornwell*, 113 N. Y. 115; *Little v. Giles*, 25 Neb. 314; *West v. Randle*, 79 Ga. 28. See, also, following cases, as maintaining the doctrine, that the word "money" is notoriously used in a much wider, more indefinite, and elastic sense, and it may have any meaning which the testamentary intent, as manifested by the will read in the light of proper evidence, imparts to it." *Levy's Estate*, 161 Pa. St. 189; *Dillard v. Dillard*, 97 Va. 434.

Certainly every clause of the will, taken with the facts as disclosed by Cason, and the demand note, shows the intent of Judge Thrasher to treat and consider the five thousand dollar dividend, on deposit with the Port Gibson Oil Works, as "money" remaining at time of his death.

"A promissory note, bill of exchange, or other paper payable on demand is due "immediately." *Hotel Lanier Co. v. Johnson*, 103 Ga. 604; *Mobile Savs. Bank v. McDonnell*, 4 So. 346.

The case of *Leonard v. Olsen*, 61 Am. St. Rep. 231, *et seq.* grew out of a demand note, which on its face, provided for payment of interest annually, etc. The payee endorsed the note to Arah Leonard and others. The effort in said case was to hold endorsers. The court ruled as follows: First. "The indorsement of a negotiable instrument payable on demand is presumed to have been made on the day the instrument was exe-

cuted;" second. "A promissory note, payable on demand, will be considered overdue and dishonored unless payment is in some manner demanded within a reasonable time;" third. "Negotiable instruments, payable on demand, whether with or without interest mature as to the endorser, only when payment is demanded, and it must be demanded within a reasonable time." See also note at foot of above named case.

In the case of *Kraft v. Thomas*, 18 Am. St. Rep. 346, 347 & note, the court said: "A promissory note payable on demand is due immediately, without demand, and" the statute of limitations commences to run at once from the time of its execution.

The paper mailed to Judge Thrasher refers to the amount of money named therein, as being deferred dividend. That is paper accompanying the note payable on demand, or on day following demand, etc. So the five thousand dollars was money actually due to Judge Thrasher. Holding it by the Oil Works Company, payable on demand, placed it *ex vi termini*, subject to his order. He had this paper when he wrote his will and knew it was at the Oil Works subject to his immediate order and payable immediately. As a lawyer of learning and ability he knew it when he drew his will. His intention, from the will read and construed as a whole, manifests that he dealt with all of his property, known to him, when he wrote the seven clauses thereof. He, by the first, second, third, fourth and fifth clauses sought to dispose of all his property.

POTTER, J., delivered the opinion of the court.

Judge Steven Thrasher, a business man and lawyer, was a resident of Claiborne county during his life and died testate, and involved in this controversy is the proper construction of his will on one point. The fifth clause of Mr. Thrasher's will is as follows:

"If I should have more than three thousand dollars in money on hand at the time of my death, then I give

one thousand dollars to Mrs. Bettie B. Humphreys, wife of B. E. Humphreys, and one thousand dollars to R. E. Lee Hamilton, my stepson. Otherwise I give all money to my beloved wife, Martha J. Thrasher."

After having made specific bequests, he disposes of the residue of his property in the sixth clause of the will, by which he provides that:

"All other property of whatsoever kind or description, I will and bequeath to my beloved wife, Martha J. Thrasher."

When the testator died he had on deposit in the Port Gibson Bank subject to check the sum of one thousand seven hundred and thirty-one dollars and forty-two cents, and on deposit with the Delta Trust & Bank Company, at Vicksburg the additional sum of six hundred and forty-seven dollars and seventy cents, in all two thousand three hundred and seventy-nine dollars and twelve cents, the aggregate being less than three thousand dollars. He had also a promissory note payable on demand, dated July 28, 1913, for five thousand dollars bearing six per cent. per annum interest from date, and signed by the Port Gibson Oil Works. This note was given by the Port Gibson Oil Works, in which Mr. Thrasher was a stockholder, for dividends on his stock. This note was mailed to Mr. Thrasher at Red Lick, Miss., and the letter, transmitting the note to him, written by the Oil Mill Company, is as follows:

"You will note that we have made the paper payable on demand, but, of course, this with the understanding that we are to use the funds until the close of the season as per our agreement today."

The only question for us to determine is whether or not the note above mentioned was to be counted as money on hand in construing the will and to thereby determine whether or not the decedent had on hand more than three thousand dollars in money at the time of his death, and to therefore determine whether or not Mrs. Humphreys and Mr. Hamilton are entitled to the

legacies of one thousand dollars each, as it was a condition precedent to their right to take these legacies that the decedent should have "more than three thousand dollars in money on hand" at the time he died. On a petition filed in the chancery court of Claiborne county by the executrix, praying for a construction of this will, the court decreed that the note for five thousand dollars was to be counted as money on hand, and decreed that the executrix should pay the two legatees the sums bequeathed to them respectively. From this decree the executrix appeals.

Unless there is something in the context of the will that would indicate another and different meaning, the phrase "money on hand" means what it ordinarily does, cash money in one's possession or on deposit in a bank subject to check, or bank notes used as a circulating medium of exchange. But the will itself in this case clearly indicates that Judge Thrasher used the phrase "money on hand" in its ordinary acceptation, meaning thereby the actual money that he should have on deposit at the time of his death, or money in bank subject to his check. If he had intended to treat the five thousand dollar note as cash on hand, it would have been unnecessary for him to have provided in his will that these legatees would take one thousand dollars each, provided he had more than three thousand dollars on hand. He would have simply left them a cash legacy of one thousand dollars each. In his will he provided that if he should have more than three thousand dollars in money on hand at the time of his death, then Mrs. Humphreys and Mr. Hamilton should have one thousand dollars each, and the balance of his money was, of course, disposed of by the general residue clause in his will. It was therefore the evident intention of the testator to be certain that his wife would be amply provided with cash money at the time of his death, and he so constructed his will that, in all events, she would have one thousand dollars in money if he had that much on hand at the time of

his death. In other words, it was the testator's intention to leave his wife at all events one thousand dollars or more in cash money, probably realizing how difficult it is at times to obtain ready money even on good security, and the necessity of actual cash to a widow who is just beginning to look after business matters on her own account. We, therefore, hold that in construing Mr. Thrasher's will the demand note for five thousand dollars should not be counted as money on hand, and, the decedent having died without having "more than three thousand dollars in money on hand," that Mrs. Martha J. Thrasher is entitled to such cash money, and the legacies to Mrs. Humphreys and Mr. Hamilton fail.

Reversed and remanded.

HUNTER v. INGRAM-DAY LUMBER Co.

[70 South. 901.]

1. MASTER AND SERVANT. *Fellow servant. Statute. Railroad. Injury to employee. Neglect of fellow servant. Abrogation of doctrine.*

A railroad equipped with cars propelled by steam and run on tracks including a "skidder" operated by steam, to draw logs to the cars by means of a cable, and a "ladder," which was operated by steam, and to load the logs on the cars, is such a railroad as is contemplated by Laws 1908, chapter 195, section 1, which provides that "every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, shall have the same rights, and remedies for any injury suffered by him from the act or omission of such railroad corporation or others or their employees as are allowed by law to other persons not employed.

2. MASTER AND SERVANT. *Injury to employee. Negligence of fellow servant.*

Where plaintiff an employee of a lumber company was injured while employed in loading one of its cars by means of a steam "loader" by reason of the failure of a fellow servant who was engaged in operating a steam "skidder" to give the usual warning signal, he was within the protection of Laws 1908, chapter 194, section 1, and may recover for injuries sustained by reason of the negligence of a fellow servant.

APPEAL from the circuit court of Harrison county.

HON. J. G. BALLENGER, Judge.

Suit by Joe Hunter against the Ingram-Day Lumber Company. From an order sustaining a demurrer to plaintiff's declaration, he appeals.

The facts are fully stated in the opinion of the court.

Mize & Mize, for appellant.

J. A. Leathers, for appellee.

POTTER, J., delivered the opinion of the court.

The appellant in this case, plaintiff in the court below, filed his declaration consisting of three counts. In the first count the plaintiff alleged that he was employed by the defendant and the defendant failed to furnish a reasonably safe place to work, in that the defendant was engaged in loading logs with a "skidder and a loader." The said skidder and loader were carried out on the defendant's railroad line into the woods where logs are loaded on the cars. The skidder is a machine on which a drum is attached to which are cables extending out into the woods, to the ends of which cables are attached tongs to be fastened on the logs in the woods some distance away. The skidder was operated by steam, and, by the cable mentioned, drew the logs to the tracks to be loaded on the cars. Immediately next to the skidder is the loader, which is a machine or car on which there is a derrick to which is attached a cable, and to the end of this tongs

are attached to be fastened onto the logs so they could be hoisted on the cars. The loader was also propelled by steam. In defendant's employ were a number of men necessary to operate said skidder and loader, some to attach the tongs to logs in the woods, others to detach them at the skidder, and others to attach the tongs to logs to be loaded on the train. Appellant's duties under his employment were to attach the tongs belonging to the loader onto the logs after they were brought in by the skidder, and to attach the tongs of the loader to "tops" that might be drawn in so as to throw them out of the way. In loading the car with this skidder and loader arrangement the defendant had in its employ a servant whose duty it was to blow a whistle as the logs drawn by the skidder would come near the place where they were to be deposited to be loaded on the cars, and it was this servant's duty also to operate the skidder. This whistle was blown for the purpose of warning the employees to get out of the way of incoming logs. Appellant knew of this custom, and relied on the customary signal being given him as the logs were drawn in. At the time the appellant was engaged in the performance of his duty attaching the tongs of the loader to "tops" that had been drawn so as to throw them out of the way, and while he was engaged in doing this it is alleged the defendant's servant whose duty it was to blow the whistle of warning as the logs were being drawn in negligently failed to blow the whistle and give the warning, and a log that was at that time being drawn into the place where appellant was at work with his back turned struck another log in close proximity to appellant and drove the last log against appellant's leg and crushed it against the railroad track, severely injuring him.

The second count of the declaration alleged that there was a further rule and custom to have another servant known as a flagman whose duty it was to flag the operator of the skidder when a log was to be drawn in, so that the operator of the skidder would know exactly when to blow the warning whistle, and that this flagman was stationed

and maintained by the defendant for that specific purpose, and was kept there all the time so that he could give the skidder operator warning of the approach of the log, so that the skidder operator might blow the whistle, and that this flagman negligently failed in giving the necessary signal on the approach of the log being drawn in on this occasion, and consequently the plaintiff was injured.

A third count combines the negligence alleged in the first and second counts.

The sole question presented for the decision of the court is whether or not the employee to whom defendant had delegated the duty of warning appellant when logs were being drawn in was a fellow servant of the appellant.

At the time the appellant was injured he was an employee of the lumber company which had in operation a railroad used in hauling logs, and this railroad was equipped with cars propelled by steam and the cars ran on tracks. Section 1 of chapter 194 of the Laws of Mississippi of 1908, at page 204 provides that:

“Every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks, shall have the same rights and remedies for an injury suffered by him from the act or omission of such railroad corporation or others, or their employees, as are allowed by law to other persons not employed.”

In *Construction Co. v. Heflin*, 88 Miss. 314, 42 So. 174, this court held that section 193 of the Constitution, abrogating the fellow-servant rule as to certain classes of employees of a “railroad corporation,” applied only to commercial railroads, and did not apply to railroads owned and operated as an adjunct to the main business of the owners, although the equipment of such railroad companies, other than commercial railroads, were of the same nature and kind as the equipment of commercial railroads, and although the hazards of other classes of rail-

roads were the same kind and degree as of commercial railroads. The intent and purpose of the Act of 1908 above quoted was to extend to the employees of railroads other than commercial railroads the same protection that is extended by section 193 to certain classes of employees of commercial railroads. In other words, it was the intention of the legislature in passing this act to put all employees employed in and about the dangerous business of railroading in the same category with reference to the fellow-servant law. The plaintiff in this case cannot recover unless the duties assigned to him exposed him to the peculiar hazards incident to the use and operation of railroad trains. It is therefore necessary to determine, in passing upon this case whether or not the employment in which the plaintiff was engaged at the time he was injured according to the allegations of the declaration was such as brought him within the protection of the statute in question.

The defendant company, by whom the plaintiff was employed, owned and operated the railroad in question. This railroad was equipped with engines and cars propelled by steam and running on tracks, and, in so far as the equipment is concerned, it is certain that appellant's employer's outfit was such as is contemplated by the statute. The entire system that appellee had in operation at the time the appellant was injured was an arrangement to load cars that were propelled by steam and run on tracks, and the plaintiff at the time of his injury was engaged in loading one of appellant's cars on the railroad in question. It is not necessary in order for a person to recover under the terms of the fellow-servant statute of 1908 that such person be injured by the actual running or movement of the cars. The legislature, acting within its discretion, has determined that all persons working in and about the operation of railroad trains are engaged in a hazardous business and are entitled to the protection afforded by the statute in question. All work in and around the operation of railroad trains is necessarily dan-

gerous, whether that work has to do with the movement of cars or the loading of same, or any other employment in the operating department of a railroad.

The very question in issue in a case almost identical on a statute similar to our own has been decided by the supreme court of the United States in the case of the *Chicago, Kansas & Western R. R. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675. In that case Mr. Chief Justice Fuller, made the following summary of the facts:

"Pontius brought an action against the railroad company in the district court of Dickinson county, Kan., to recover for injuries sustained by him while in the employment of the company, and obtained judgment for two thousand dollars. The case was taken on error to the supreme court of the state, and the judgment affirmed, whereupon a writ of error was allowed from this court, and, the cause having been docketed, a motion to dismiss the writ or affirm the judgment was submitted.

"In the opinion of the supreme court of Kansas, reported 52 Kan. 264, 34 Pac. 739, the case is stated thus: 'Clifford R. Pontius was employed by the defendant company as a bridge carpenter, and worked in that capacity at various points on the line of defendant's road. A bridge was constructed across the Verdigris river, in Greenwood county. The false work used for support in its construction was taken down, and the timbers of which it was composed were hoisted and loaded into cars on the bridge to be transported to some other point on defendant's road. The timbers were muddy and slippery. The mode of hoisting them was to attach a rope or chain to the timbers, and to raise them by means of a pile driver. When a stick was raised to a sufficient height, a rope was thrown around the lower end of it, and a number of men, of whom plaintiff was one, would pull it out on the car. A chain had been used on the end of the rope to hold timbers which were being hoisted, and several pieces had been raised in that way. The chain, however, was thrown aside, and one piece was raised with the rope. When the men undertook to pull

it back on the car, the rope slipped off, the timber fell and caused the injury, for which the plaintiff sues.' "

And in deciding the case, Justice Fuller said:

"It is now contended that the plaintiff was a bridge builder; that the legislation only applied to employees exposed to the peculiar hazards incident to the use and operation of railroads; that the railroad company could not be subjected to any greater liability to its employees who were engaged in building its bridges than any other private individual or corporation engaged in the same business; and that the statute had been so construed in this case as to make the company liable to its employees when engaged in building its bridges, notwithstanding bridge building was not accompanied, and had not been treated by legislation as accompanied, by peculiar perils, thus discriminating against the particular corporation irrespective of the character of the employment, in contravention of the Fourteenth Amendment. But the difficulty with this argument is that the state supreme court found upon the facts that, although the plaintiff's general employment was that of a bridge carpenter, he was engaged at the time the accident occurred, not in building a bridge but in loading timbers on a car for transportation over the line of defendant's road."

We see practically no difference in the Kansas statute above mentioned and our own statute of 1908, and the employment in which the plaintiff in the *Pontius Case* and the plaintiff in this case were engaged at the time of injury is about the same. We think it clear that at the time the plaintiff was injured that both he and the persons whose duty it was to give the signals were employed in and about loading the car in question, and that, the fellow-servant doctrine having been abrogated as to such employees by chapter 194 of the Laws of 1908, the declaration in question states a cause of action, and the demurrer should have been overruled.

Reversed and remanded.

CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MISSISSIPPI
AT THE
OCTOBER TERM, 1915.

DAVIS *v.* STATE.

[70 South. 578.]

ASSAULT WITH INTENT TO KILL. *Self defense. Corroborative evidence.*

Where in a prosecution for assault and battery with intent to kill the theory of the defense, established by his evidence, was that the person assaulted was the aggressor and that defendant acted throughout in necessary self-defense, and accused testified that when the party assaulted advanced upon him, his wife who was present, cried, "Don't Charlie; don't do that!" there being evidence that Charlie was the injured man's name. In such case it was error to exclude the testimony of another witness who was about two hundred yards distant, from the fight, that he heard the injured man's wife cry "Don't Charlie, Don't."

APPEAL from the circuit court of Harrison county.

HON. JAS. H. NEVILLE, Judge.

Bing Davis was convicted of assault and battery and appeals.

The facts are fully stated in the opinion of the court.

Cook, J., delivered the opinion of the court.

Appellant was tried upon an indictment charging him with an assault and battery with the intent to kill and murder. The jury returned a verdict finding him guilty of assault and battery. The evidence was in sharp conflict; that of the state establishing his guilt, while his own

110 Miss.] (751)

testimony, if believed, entitled him to a verdict of not guilty. There are several assignments of error, but we will consider one only.

The theory of defense, established by his evidence, was that the person assaulted was the aggressor, and that appellant acted throughout in necessary self-defense. Appellant testified that the person assaulted first made an assault upon him with a dangerous weapon—a chair—and that he struck in self-defense. Among the persons present was the wife of the party appellant is charged with assaulting; and appellant testified that, when her husband advanced upon appellant with the chair, his wife cried, “Don’t Charlie; don’t do that!” Appellant offered to prove by another witness that this witness was about two hundred yards from the scene of the battle, and heard the injured man’s wife cry, “Don’t Charlie, don’t!” The proof shows that “Charlie” was her husband’s name. Upon the objection of the state, this testimony was not permitted to go to the jury.

We think this evidence was pertinent and competent, and its rejection by the court, on the facts of this case, was reversible error.

Reversed and remanded.

GULF & S. I. R. Co. ET AL. v. BUDDENDORFT.

[70 South. 704.]

1. COMMERCE. *Interstate commerce commission. Jurisdiction of courts. Action for discrimination. State anti-trust law. Wharves. Discrimination in use.*

Since only those matters must first come before the interstate commerce commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and

similar questions of practice, the commission does not first have to pass upon those questions which constitute a violation or denial of unquestioned legal duties of giving service as a common carrier *per se*; and so an action for damages for discrimination in facilities on a wharf, the terminus of a railroad, need not be brought before the commission before suit in the state courts.

2. INTERSTATE COMMERCE COMMISSION. *Jurisdiction of courts. State. Anti-trust laws.*

Where the complaint in a state court is based on a conspiracy to monopolize a business contrary to the state anti-trust law, precedent action by the interstate commission is not required.

3. WHARVES. *Discrimination in use.*

When a railroad built a wharf at its terminal at the foot of a public street under a charter given by the city such a wharf was private property, and it was not discrimination to lease a portion of the wharf to one ship broker for storage of parcel freight, to the exclusion of another ship broker, the other portion of the wharf being used for general merchandise, and all being given equal terms and rates, and adequate facilities for receiving being provided for at such wharf.

4. SAME.

In view of the fact that the railroad company had the right to carry on this business in the manner in which it was carried on through its own servants, it likewise had the right to carry on the same business in the same way through the agency of another.

APPEAL from the circuit court of Harrison county.

HON. T. H. BARRETT, Judge.

Suit by R. F. Buddendorft against the Gulf and Ship Island Railroad Company, and others. From a judgment for plaintiff, defendants appeal.

The facts are fully stated in the opinion of the court.

B. E. Eaton, for appellants.

J. L. Heiss, for appellee.

POTTER, J., delivered the opinion of the court.

This is an appeal from the circuit court of Harrison county, from a judgment in the sum of seven hundred and

fifty dollars in favor of appellee, who was plaintiff in the trial court against the defendants, appellants here.

The plaintiff filed his original declaration, to which the defendant demurred, and the demurrer was overruled, whereupon the plaintiff filed an amended declaration and the defendant interposed the same demurrer, which was likewise overruled. The defendants then filed a special plea, to which the plaintiff interposed a general demurrer, which demurrer was sustained. The defendants thereupon declined to plead further, and a writ of inquiry was awarded, and damages in the sum of seven hundred and fifty dollars assessed in favor of the plaintiff and against the defendants.

The plaintiff in his amended declaration alleged that the defendant Gulf & Ship Island Railroad Company was a common carrier, and operated a railroad extending from Jackson, Miss., in a southerly direction to the south end of its pier, or wharf, located in the harbor of Gulfport; that the southern end of said pier or wharf was the southern terminus of the said railroad and a part of its common carrier system, and had always been so held out to the public, and that the public had a right to ship commodities over its track extending to the end of the pier, and from thence to be transported for further carriage by such vessels as the shipper might engage for such service. The Gulfport Shipping Company, one of the defendants, according to the allegations in the declaration, was a partnership concern, domiciled at Gulfport, and professed to be engaged in the general business of engaging freight, but was "in fact and truth the Gulf & Ship Island Railroad Company, operating under the above-styled name for the purposes hereinafter named."

The declaration alleged that J. W. Corry & Co., also a defendant, was a corporation domiciled at Gulfport, and engaged in the general business of ship brokers, which business consists of making freight engagements and contracts of every kind for transportation by water at said port. The plaintiff then alleged "that prior to his

undertaking, hereinafter mentioned," he had been, for some forty years, engaged in the business of general ship broker and ship agent in the city of New Orleans, during which time he had built up an "extensive and valuable acquaintance and connection for said business in this and in foreign lands, and was extensively known and trusted as being thoroughly qualified for the business."

The plaintiff then charged that when he first established himself in the business of ship broker and agent at Gulfport, he was given assurances by the railroad company, through its vice president and its general freight and passenger agent, that the railroad company would welcome him and afford every facility and accommodation necessary to the establishment of the business, and would furnish him rates therefor at his request, and that, relying thereon, he began the establishment of his business by soliciting business from various points in the state and beyond for the shipment of cotton, cotton seed meal, cotton seed cake, staves, and other merchandise, and did secure offers of cargoes for shipment by water from Gulfport, and did secure offers of steamship and sailing vessel rates for the transportation of same from said pier and wharf at acceptable rates. The plaintiff then charged that about the time he had completed his arrangements, the defendants "did conspire, confederate and agree among themselves to perfect a monopoly of all the export and import business from the harbor of Gulfport, on merchandise other than lumber and naval stores, in this, that the defendant railroad company had heretofore, to wit, during the year of 1909, made a formal and pretended lease of the greater portion of the available free space on said wharf to the said J. W. Corry & Company for the erection of said warehouses or sheds thereon in the name of the said J. W. Corry & Co., while in fact said sheds were erected for or by said railroad company with the distinct agreement and understanding that said lease should, within a short time agreed upon, be transferred back to the said railroad company, which was

thereafter done; that thereafter, to wit, during the early part of 1910, as a part of said agreed plan, the said railroad company, through its president and other officials, organized the said Gulfport Shipping Company, and owned and controlled same, having for its officers the said certain officials of said railroad and its confidential men, and that the said agreement as thus completed was for the purpose of effecting a monopoly upon all said business at said pier and thereby to exclude all competition as to rates and vessels, so as to fix said rates free from competition and to preserve to themselves all the profits therefrom; that as a part of said preconceived scheme, plan, and agreement, the Gulfport Shipping Company, upon its organization, made the said J. W. Corry & Company its exclusive agent and its control in all business of said character at said port.

Plaintiff further alleged that thereafter he endeavored to secure rates from the defendants on merchandise for export, and endeavored to procure facilities upon the wharf for handling the same similar to facilities afforded Corry & Co.; that these facilities were denied on the ground that the exclusive rights to same belonged to Corry & Co., and that they would not be shared with plaintiff, who was a competitor of Corry & Co.; that in May, 1910, plaintiff sought business from A. Le More & Co., of New Orleans, but that an agent of the defendant railroad company wrote said firm that the Gulfport Shipping Company was a proper party to handle the shipment, and that the refusal of the wharf facilities to the plaintiff prevented him from securing this business; that a similar situation prevented plaintiff from making a shipment of two thousand tons of cotton seed cakes from Gulfport in 1910; that the denial of facilities aforesaid prevented plaintiff from engaging in the business of ship broker; and that the defendants had conspired and confederated against him, and had violated the statutes of Mississippi prohibiting trusts and combines; and dam-

ages were asked for actual and punitive in the sum of ten thousand dollars.

To this declaration the defendant filed a demurrer setting up the following grounds: (a) The commerce shown by the declaration in which the plaintiff was to be engaged was interstate. (b) It was necessary for all complaints with reference to discrimination in the movement of interstate commerce to be first presented to the Interstate Commerce Commission. (c) No suit of any kind can be maintained for an alleged discrimination with reference to the movement of interstate commerce until the question of discrimination has been submitted to and passed upon by the Interstate Commerce Commission. (d) In no event has this court the jurisdiction to try and determine the issues here involved.

This demurrer was also overruled, and defendants filed a special plea, in substance, as follows:

That the defendant railroad company had adequate terminal facilities in the city of Gulfport for the receipt and delivery of merchandise committed to it for transportation and delivery to the city of Gulfport, and that, while there is a physical connection by rail between its depots and yards and wharves referred to in the declaration, and while the railroad company is authorized and empowered by its charter to locate, construct, and thereafter to own and maintain and use suitable wharves, piers, breakwaters, basis, and depots and other appurtenances thereon for loading and unloading, receiving and discharging, freight and passengers from or to sea-going, lightering, and coasting vessels, neither the provisions of the charter nor any statutory law compels or requires, or did compel or require, the railroad to construct and maintain the wharf mentioned in plaintiff's declaration; that the wharf so referred to was constructed by the railroad company at an expense of several hundred thousand dollars, and was maintained at an enormous expense; and that the wharf was constructed for the purpose of procuring the transportation of goods beyond its own line

in connection with such ocean carriers as it might select with which jointly to issue through export bills of lading from interior points to foreign destinations, but that no other business was ever done at the wharf except the transportation by the railroad company in cars on its railroad of articles of commerce to and from vessels lying at the said wharf, and of commerce brought to or to be transported by such vessels and the loading and unloading of same into and from said vessels.

Defendants further allege in the special plea that after the construction of the wharf in question, the railroad company promulgated its rules and regulations, by which it was expressly provided that the wharf was the private property of the Gulf & Ship Island Railroad Company, and that vessels would be permitted to come and lie at said wharf only upon the consent of the railroad company, according to its rules and regulations promulgated from time to time. It was further set up that the wharf was ready for use in the year 1902, and that the rules and regulations above mentioned had been in force and effect continuously from that time up to and including the time mentioned in plaintiff's declaration, and to the present day; that in its rules, the railroad company expressly reserved the right to give preference at its wharf to ships engaged in the transportation of parcel shipments from said port and that no boats or vessels, for the purpose of taking on or unloading cargoes, had ever been permitted to occupy a berth at said wharves except upon compliance with the rules and regulations prescribed by the railroad company, with the stipulation that the wharves were and are the private property of the railroad company, and that the vessels might tie up to or remain at the wharf only in strict compliance with such rules and regulations; that the recognition of the rules and regulations above mentioned had, at all times, been required before boats were permitted to berth at the wharf, and that the purpose of reserving such preference was the desire and effort of the railroad company to build

up the exportation of general cargoes from the port of Gulfport, and to build up this business it was necessary for the railroad company to issue, or have issued, in connection with some ocean carriers, through bills of lading from points of origin to foreign points of destination; that the railroad company, upon issuing the bills of lading mentioned, was liable both to the shippers and consignees for the safe, proper, and prompt transportation of such shipments to foreign destinations; and, because of the responsibility it had assumed, that it was necessary for the railroad company to secure an ocean carrying agent of such financial strength and with facilities as would be adequate to the successful carrying on of the aforesaid enterprise. It was then alleged that the facilities offered by J. W. Corry & Co. appeared to the railroad to be the best, and that Corry & Co. was an established carrier of ocean freights, and was financially responsible, and therefore Corry & Co. were authorized by the railroad company to occupy the space on the wharf mentioned in plaintiff's declaration, for the purpose of aiding the railroad company in the building up of general cargo shipments for export and for affording necessary financial protection to the railroad against loss and damage because of the issuance by it of through bills of lading for the movement of such commodities in connection with Corry & Co.; that the Gulfport Shipping Company was financially solvent, and was a responsible shipping company, organized for the purpose of enlarging the export movement from Gulfport, and that with the permission of the railroad company it acquired from Corry & Co. the rights and privileges as to space and warehouses and berths for vessels that had previously been granted Corry & Co.; and that the shipping company carried out the business arrangement theretofore existing between Corry & Co. and the railroad company for export movements of commerce. The plea then sets out that the plaintiff was engaged in the business of ocean freight carrying, but that he was not satisfactory to

the defendant for the issuance of through export bills of lading in connection with the movement of foreign commerce, but that, through the agency of Corry & Co. and the Gulfport Shipping Co., the railroad company was enabled to and did receive all commodities for export desiring an outlet through the harbor of Gulfport, and that the movement of same was in no wise hindered, obstructed, or delayed because of any arrangements existing between the defendants for the movement of commodities by water from the port of Gulfport.

According to the allegations of the special plea, the space allotted Corry & Co. occupied approximately five hundred feet at the south end of the pier, and that there remained outside of this five hundred feet an additional space of approximately two thousand two hundred feet, to which, under the rules and regulations of the railroad company, vessels other than general cargo vessels were permitted to occupy berths and take on cargoes; that there were at the times alleged in the plaintiff's declaration, and still are, many shippers in connection with whom no through export bills of lading are issued by the defendant, exporting through the port of Gulfport, who charter and own vessels and procure ocean transportation for their export products; that in such instances the shippers load directly from the cars upon which the export commodities were placed alongside the various ships, and that shipments so made are designated "full cargo shipments;" that the "full cargo shipments" constituted a large part of the export movement from Gulfport, and that vessels carrying "full cargo shipments," upon being chartered, and the rules and regulations promulgated by the railroad company subscribed to, were and now are assigned berths at said wharf, each vessel in its regular turn, and that the plaintiff was given the opportunity, so far as "full cargo shipments" were concerned, upon subscribing to the rules and regulations, of having vessels occupy berths at the wharf in the same manner and in

the same extent that were offered other shippers of "full cargo shipments."

It was further alleged that there was no other space or room to apportion to the plaintiff, or any one else, for the purpose of storage, except at an inconvenience and loss to merchants engaged in "full cargo shipments," or the lessening of the space allotted Corry & Co. and the Gulfport Shipping Company for parcel shipments, and that as to parcel shipments moving through the port of Gulfport, the facilities and advantages of the space and wharves occupied by Corry & Co. and the Gulfport Shipping Company were offered alike and without discrimination to all shippers and to all available points, and that Corry & Co. and the Gulfport Shipping Company received and transmitted on equal terms all shipments of commodities moving through Gulfport destined to foreign ports. The defendant then denied that it was under any legal obligation to furnish plaintiff the facilities alleged in his declaration to have been denied.

The plaintiff then filed a general demurrer to the above plea, and the demurrer was sustained. The defendant declined to plead further, and the judgment was entered accordingly.

The questions we have to determine are: First, whether this court has jurisdiction, or whether this is a matter within the exclusive control of the Interstate Commerce Commission; and, secondly, whether the special plea set out above constituted a good defense to plaintiff's declaration. It is strongly urged by the defendant railroad company that this is a matter over which the state courts have no jurisdiction, and that the determination as to whether the matters complained of in the plaintiff's declaration was, or was not, an unjust discrimination is for the Interstate Commerce Commission and not the courts; that the commerce in question comes within the classification of commerce which is subject by the act to regulate commerce, passed by Congress,

to the control and direction of the Interstate Commerce Commission, and, likewise, the subject-matter of the controversy, the wharves of the railroad company and its practices relating thereto, for the reason that they are facilities used in connection with the movement of interstate and foreign commerce, are likewise embraced in the act to regulate commerce, and subject to the supervision and jurisdiction exclusively of the Interstate Commerce Commission. In our opinion, this contention is not well founded. As stated in the able brief of counsel for appellee in this case:

"It has been repeatedly held by the United States supreme court that only those matters must first come before the Interstate Commerce Commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and similar questions of practice; that the Commission did not first have to pass upon those questions which constituted a violation or denial of unquestioned legal duties of giving service as a common carrier *per se*. The Commission was given exclusive jurisdiction of administrative matters for the reason that therein they were not deciding questions of law, or judicial questions, but questions of the reasonableness of rules, procedure, and business supervision on which opinions might well differ; and therefore, to prevent contrary holdings on similar questions and to insure uniformity, the court holds the Commission's jurisdiction on such matters to be exclusive. To permit different courts or bodies to pass upon such questions might result in what one would hold reasonable on questions of rates, facilities, switching charges or car service, etc., another might hold unreasonable, thereby creating the discrimination that the act sought to avoid."

See *T. & P. R. R. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; *L. & N. Railroad Co. v. F. W. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; *Penn R. R. Co.*

v. *Puritan Coal Mfg. Co.*, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; *Eastern R. R. Co. of New Mexico v. Littlefield*, 237 U. S. 140, 35 Sup. Ct. 489, 59 L. Ed. 878.

Not only does the declaration in this case charge a discrimination in favor of Corry & Co. and the Gulfport Shipping Company, but it also charges a conspiracy to monopolize the business in which plaintiff was engaged, contrary to the anti-trust laws of this state. As to whether or not a violation of the anti-trust statutes is presented is clearly a matter within the province of this court to inquire into; and, for that purpose, it undoubtedly has jurisdiction.

We now come to the question of whether or not the special plea of defendant was a sufficient defense at law to plaintiff's declaration, and this resolves itself into the question of whether or not the defendant was justifiable in refusing facilities to the appellee for the purpose of storing freight on its wharf that it afforded to Corry & Co.; for there is no question in this case with reference to any refusal on the part of the railroad company to receive any freight offered it for transportation, and there is no complaint that any discrimination between shippers has been made. The special plea sets up that all persons desiring to make shipments were afforded the same services and the same rates by the railroad company, which owned and controlled the wharf. The special plea sets up that adequate depots and yards were furnished by the railroad in the city of Gulfport for the receipt and delivery of merchandise committed to it for transportation; that the wharves in question were its private property and constructed and maintained by it at great cost; that the wharves were constructed for the purpose of more conveniently transporting commerce beyond its own line in connection with such ocean carriers as it might select with which to issue through bills of lading, and that no other business had been done at that wharf except transportation in connection therewith; that at no time had the use of the wharf been permitted except

upon the distinct understanding of the shippers and owners that the wharf was a private wharf, and that in accordance with the rules regularly adopted by the railroad company that certain kinds of vessels and certain kinds of cargoes were to have preferred space and facilities; that the commerce carried on in connection with Corry & Co. was of the kind for which a preference was intended and made. In the case of *L. & N. R. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 25 Sup. Ct. 745, 49 L. Ed. 1135, the supreme court of the United States says:

"We do not see that the fact that the wharf was erected under authority from the city, at the foot of a public street of the city, makes any material difference in the character of the wharf, or that the right of plaintiff to select its own vessels to continue from that wharf the transportation of its goods is, on that ground, enhanced, or the right of defendant to control the wharf for its own use when erected is thereby diminished. The right to erect the wharf was granted by the proper authorities, and, so far as the record shows, it was granted without imposing any conditions as to its use by the public. We think the plaintiff had no right of access to the wharf founded simply upon the fact that it was erected under proper authority, in the harbor of Pensacola, and at the foot of one of the public streets of that city. The question of the rights of plaintiff must really turn upon the character of the use of the wharf, whether it is public or private.

"The argument upon the part of plaintiff is, in substance, this: True, defendant has erected a wharf which is not in fact intended or used as the terminus of its road at Pensacola, adequate yards and depots having been furnished by the defendant for all goods and passengers destined to Pensacola only; but the wharf has been erected to enable defendant to more conveniently carry out contracts for transportation beyond its own line, which it was not compelled to make, and which it could carry out by such agencies as it chose; but the plain-

tiff, having goods destined for points outside of Florida, insists upon its right to use the road of defendant, not to carry these goods to Pensacola, but to defendant's wharf, so that plaintiff may there transfer them into vessels which it has arranged to take them. In order to do this it is necessary that defendants be compelled to share its possession of its own wharf with the managers of these other vessels. For this possession plaintiff is prepared to make reasonable compensation. The right on the part of the plaintiff is urged as the result of the action of defendant in permitting the use of the wharf as stated in the plea. By such use it is contended that the defendant in effect dedicated the wharf to the public, or at least, has granted to the public an interest in the use of the wharf. We are of the opinion that the wharf was not a public one, but that it was a mere facility, erected by and belonging to defendant, and used by it, in connection with that part of its road forming an extension from its regular depot and yards in Pensacola, to the wharf, for the purpose of more conveniently procuring the transportation of goods beyond its own line, and that defendant need not share such facility with the public or with any carriers other than those it chose for the purpose of effecting such further transportation. Neither the public nor the plaintiff had such interest in the wharf as would give to either the right to demand its use on payment of reasonable hire. Nor was the wharf a depot or place of storage of the defendant for goods to be delivered at or taken from the city of Pensacola for transportation by rail. The defendant had adequate depots and yards in that city for the proper storage of all merchandise committed to it for delivery at Pensacola, or there received, to be transported therefrom by defendant. All consignees of goods at Pensacola had equal facilities for obtaining them there. . . . "

The principle was laid down, in what are known as the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791, that railroad companies have the right to contract with

particular express companies for the transportation of traffic over their railroads, and that the railroad company was not bound to transport the traffic of an independent express company over its lines in the same manner in which it transported the traffic of the particular company contracted with; in other words, that the railroad company was not bound to furnish, in the absence of statutes, to all independent express companies, equal facilities for doing an express business upon their passenger trains.

The case of *Y. & M. V. Railroad Co. v. Crawford*, 65 So. 462, L. R. A. 1915C, 250, decides the principle of law involved in this case. In that case it was decided that a railroad company, having made a contract with one log-loading company to the exclusion of other companies engaged in a like business to load its cars, did not violate the anti-trust statutes, and that this contract did not constitute an illegal monopoly. The court in that case said:

“We are of opinion that the contract made with the Valley Log Loading Company under the circumstances was not an illegal contract. The arrangement which the railroad company had made with reference to the loading of logs and furnishing to parties its cars, engines, and crews was not in any sense a function or duty required of the company in its capacity as a common carrier. There was no legal obligation resting upon the railroad company to furnish its cars, engines, and crews to individuals carrying on a log-loading business, or to receive logs to be loaded on its cars along the right of way between stations. The railroad company could itself have undertaken this to the exclusion of everybody else. This is not controverted. It would then monopolize the business in a sense, but not illegally. In the case of *Houck v. Wright*, 77 Miss. 483, 27 So. 617, this court says: ‘The legislature, by the chapter on Trusts and Com-
Fines, did not intend to debar a person from conducting his own private business according to his own judgment.’ It was not the purpose to limit either the term used in the

Constitution or in the statute by any narrow definition, but leave it to the courts to look beneath the surface, and from the methods employed in the conduct of his business to determine whether the association or combine in question, no matter what its particular form should chance to be, or what might be its constituent elements, is taking advantage of the public in an unlawful way. This case and this extract from it were cited with approval of this court in the case of the *Telephone & Telegraph Co. v. State*, 100 Miss. 116, 54 So. 670, 39 L. R. A. (N. S.) 277."

There is no complaint in this case that every shipper did not enjoy the same rights and privileges that were extended to every other shipper. The plea shows that the shipping public enjoyed the entire rights upon the wharf, and the small shippers not having enough cargo for an entire ship, by means of concentrations upon the pier, or by pooling freight, could make parcel shipments, and in so doing avail themselves of the benefits of the market; and the railroad company allotted on the wharf the space in question for this purpose. No discrimination of any kind is charged with reference to any shipments of freight offered to the railroad company at the wharf.

In our opinion, the railroad company had the right, to the exclusion of every one else, to have undertaken to store the parcels received at its wharf at Gulfport for shipment; and it could have made the contracts of shipment of same with vessels of its own choosing, to the exclusion of every one else. In view of the fact that the railroad company had the right to carry on this business in the manner in which it was carried on through its own servants, it is clear to us that it would have the right likewise to carry on the same business in the same way through the agency of Corry & Co. and the Gulfport Shipping Company. The special plea sets up a sufficient defense to plaintiff's declaration. This cause is therefore reversed and remanded.

Reversed and remanded.

STATE EX REL. ATTORNEY-GENERAL v. BLODGETT.

[70 South. 710.]

1. PUBLIC LANDS. *Sale of timber. Setting aside. Sufficiency of bill.*

The board of supervisors has full power in the exercise of its discretion to sell timber on sixteenth section land to the lessee of the land or any one else.

2. SAME.

A bill by the state on the relation of the attorney-general to cancel a conveyance of timber on sixteenth section land by the board of supervisors, to the lessee of the land for five hundred dollars, which gave to him twenty years in which to remove the timber and provided for a surrender of the remainder of the lease as soon as he had cut the timber, or at the expiration of twenty years, and which alleged that the timber was worth three thousand dollars; that the price was grossly inadequate; that there was no necessity to sell the timber; that it was sold by the board of supervisors because the lessee wished to purchase it, and not to promote the interest of the owners of the property, and that the board knew no one else could bid on it because of the lease to defendant, does not show fraud or collusion between the board and defendant, especially since the surrender of the remainder of the lease after the timber was cut, or at the end of twenty years, was a consideration for the conveyance, in addition to the money consideration.

APPEAL from the chancery court of Green county.

HON. J. M. STEVENS, Judge.

Bill by the state, on relation of the attorney-general, against John W. Blodgett trustee. From a decree for defendant on demurrer the state appeals.

The facts are fully stated in the opinion of the court.

Lamar F. Easterling, Assistant Attorney-General, for the state.

Ford & White, for appellee.

SYKES, J., delivered the opinion of the court.

The averments in the bill are substantially the same as those in the cases of *Dantzler Lumber Co. v. State*, 97 Miss. 355, 53 So. 1, and *State v. Dunnam*, 67 So. 461. In the *Dunnam Case*, a demurrer interposed to the bill was sustained by the court below, just as was done in this case; and the action of the lower court in that case was affirmed here.

It is the contention of the state that the bill in this case charges fraud and collusion between the board of supervisors and the appellee. This contention is based upon the allegations that the timber sold for five hundred dollars, when it was in fact worth at least three thousand dollars, which is a grossly inadequate consideration; that there was no necessity to sell said timber, and that it was sold by the board of supervisors because appellee wished to purchase it; that it was not sold for the purpose of promoting the interests of the owners of said property; that the board knew no one else could bid on it because of the lease held by appellee on said lands. The exhibit (A) to the bill shows that the timber was sold to the lessee for the sum of five hundred dollars, and that he was given twenty years in which to remove it; further, that the lessee was to surrender to the board the remainder of his lease on these lands as soon as he had cut the timber, or at the expiration of the twenty years.

That the board of supervisors had full power in the exercise of its discretion to sell this timber to the lessee of the land, or any one else, was fully settled by this court in the two cases above cited. The bill and exhibit thereto do not show any fraud or collusion; in fact, the state overlooks entirely a most valuable part of the consideration in its contention. viz., the surrender of the remainder of the lease after the timber has been cut, or at the end of twenty years.

Affirmed.

POSTAL TELEGRAPH & CABLE Co. v. GULF & S. I. R. R. Co.

[70 South. 833.]

1. TELEGRAPHS AND TELEPHONES. *Construction of lines. Railroad's right of way. Servitude. Trespasser.*

Where a telephone company acquired by condemnation a right of way for its line of poles over the right of way of a railroad company, it had no right to lease to a telegraph company the right to place one of its wires on the already erected poles of such telephone company without the consent of the railroad company, since the construction of the telegraph line would constitute an additional servitude on the railroad's right of way.

2. SAME.

In such case the telegraph company in stringing its line on the poles of the telephone company was a mere trespasser and the railroad company had the right to remove from its premises such wire, using only such force and means as was reasonably necessary to preserve its own property.

3. SAME.

In such case where the railroad company cut the telephone wire in numerous places in such a manner as to render it practically valueless, the telegraph company had a right to recover from it damages sufficient to remind the railroad company of the fact that it committed a wrong, and to compensate it for the injury sustained.

APPEAL from the chancery court of Forest county.

HON. J. MORGAN STEVENS, Chancellor.

Bill by the Postal Telegraph & Cable Company and the Mississippi Home Telephone Company, cross-complainants, against the Gulf & Ship Island Railroad Company. From a decree for defendant, cross-complainants appeal.

The Mississippi Home Telephone Company acquired by condemnation a right of way for its line of poles and wires from the city of Jackson to the city of Hattiesburg over the right of way of the appellee, Gulf & Ship Island Railroad Company for the purpose of carrying on its telephone business. The telephone company entered and erected its line of poles and strung thereon its wires from Jackson to Hattiesburg. Afterwards, in 1912, the telephone company leased to the Postal Telegraph Company the right to place one of its wires on the already-erected poles of the telephone company from Jackson

to Hattiesburg, for the purpose of carrying on its telegraph business. The telegraph company, under the lease, proceeded to string its wire from Jackson to Hattiesburg, a small portion of which was strung over the protest of the railroad company. The railroad company then filed its bill in the chancery court of Forrest county asking for an injunction forbidding the further stringing of the wire by the telegraph company. After the issuance of this injunction, which was obeyed, and without notice to the telegraph company, the railroad company sent its employees in the nighttime and cut the wire of the telegraph company in so many places and in such a manner that it was practically destroyed and rendered valueless. After the wire had been destroyed the railroad company filed a supplemental bill, asking that the telegraph company be restrained from using the wire. The telegraph company and the telephone company filed their answer, presenting the question as to the right of the telegraph company to string its wire on the poles of the telephone company. The answers of each defendant were made cross-bills, and asked for damages for the destruction of, and injury to, the property of the telegraph company and the telephone company. The lower court held that the telegraph company had placed its wire on the right of way without right, and that it was a trespasser, and that its wire was an additional servitude upon the right of way of the railroad company, and also decree that the destruction of the telegraph company's wire and the damage to the telephone company's property was rightful, and denied cross-complainants any damages for said destruction and injury to the property; from which decree this appeal here is taken.

Flowers, Brown, Chambers & Cooper, for appellant.
B. E. Eaton, for appellee.

HOLDEN, J., delivered the opinion of the court.

The record in this case presents two questions for our consideration, viz.: First, whether or not the tele-

graph company was a trespasser; and, second, whether or not the railroad company is liable to the telegraph and telephone companies in damages, regardless of whether the telegraph company was a trespasser or not. It is conceded by counsel for the appellants that the right acquired by the telephone company from the railroad company was a mere easement on the right of way of the railroad company. The question arises as to what were the powers and rights of the telephone company under the easement obtained from the railroad company. We think that the intent and purpose of the easement to the telephone company was to carry on its telephone business, and that it had no right to lease to another and different corporation the right to construct and establish its telegraph line upon this easement with which to carry on a telegraph business, and that this was an additional servitude not within the terms nor contemplated in the easement acquired by the telephone company. This is not a case where a telephone company has leased one of its wires to another company, nor is it a case where a telephone company has leased its wire to an outside party to be used for telephone purposes; but here is a lease of a right to a different corporation, engaged in a different kind of business, to construct its own wire for telegraphing purposes, and maintain the same, independently of the telephone company, over which it would conduct its telegraph business, separately and distinctly from the business of the telephone company; and it would use the wire, not for a telephone business, but for a telegraph business. We hold under the terms of the easement to the telephone company that this lease to the telegraph company would be an additional burden, and a use which could not be legally granted to it by the telephone company.

Counsel for appellants in his brief says:

"A railroad through proper proceedings condemns an easement through the lands of another and enters upon the land, lays its tracks, and operates its trains. It

possesses only an easement, and an easement to run its trains over the land. Another railroad company, with distinct and competing interest, by contract with the original company obtains the right to operate its trains over this track. Is this an additional servitude, and is the latter company a trespasser?"

Counsel urges that a railroad company is permitted to use the easement of another railroad company, which is obtained by condemnation as recited above, and is not an additional servitude, and that the same principle is involved in the case here. We concede that the authorities hold that under such circumstances another railroad company with distinct and competing interests, by contract with the original company, may obtain the right to operate its trains over the tracks of the company holding the original easement. But in all the cases cited by counsel announcing this rule they were cases where the competing railroad had obtained the privilege by a lease of the right to use the track of the original railroad company, and are not cases where the competing railroad had built its own track on the original right of way and operated its railroad business on its own track on this right of way, independently of the other railroad company. *Ft. Worth & Rio Grande R. R. Co. v. Jennings*, 76 Tex. 373, 13 S. W. 270, 8 L. R. A. 180, holds:

"Building another railroad on a portion of the unused right of way of a company which has acquired an easement only in the land creates an additional servitude, and the consent of the owner of the land must first be obtained and compensation made to him for the damage."

It appears clearly here, as already stated, that the telephone company did not undertake to lease a wire to the telegraph company to be used as a telephone wire, but it undertook to lease to the telegraph company the right to construct its own telegraph line upon the right of way for the purpose of carrying on its own business,

not a telephone business, but a telegraph business, and therefore the situation is not analogous to that in the railroad cases cited above by counsel for appellant; and the lease here by the telephone company to the telegraph company is for a similar, but different, use, which is inconsistent with the purposes for which the right of way was acquired by the telephone company; consequently it is an additional servitude which the telephone company had no right to grant to the telegraph company, and so the telegraph company was a trespasser.

Coming to the second question in this case, we think from this record that the telegraph company was a mere trespasser, having entered upon the premises in good faith under color of right. We also hold that the railroad company had a right to remove from its premises the property of the telegraph company, using such force and means as was reasonably necessary in removing the property in order to preserve and protect its own property interests.

Under the facts in this case, however, we think the railroad company went beyond its lawful rights in the premises, and unnecessarily destroyed the property of the telegraph company, and also unnecessarily injured and damaged the property of the telephone company, some of which was not on the railroad right of way. 38 Cyc. 1053; *Mead v. Pollock*, 99 Ill. App. 151; *Grier v. Ward*, 23 Ga. 145. The conduct of the railroad company may be justly characterized as unwarranted and wrongful, and for which, under the evidence in the case, the lower court ought to have adjudged damages sufficient to remind the railroad company of the fact that it committed a wrong, and to compensate the injured parties.

The decree of the lower court in denying to the appellants any damages is reversed, but in all other respects shall remain in full force and effect, and this cause is remanded for the purpose only of adjudging the amount of damages to be recovered by the appellants.

Reversed in part and remanded.

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF MISSISSIPPI

AT THE

MARCH TERM, 1916.

SULLIVAN v. GEISENBERGER.

[70 South. 887.]

1. WILLS CONSTRUCTION. *Interest devised. Removal of property.*

Where a testatrix bequeathed to her niece the sum of five hundred dollars per annum until she becomes twenty-one years old, and directs that her executor invests the same each year for her at interest in dividend bearing property and that the principal with all accumulated interest and dividends thereon, be paid over to her when she reaches her majority, but should she die before reaching her majority, then and in that event said bequest with accumulated interest thereon shall descend to her heirs at law, such a will evidenced no intention on the part of the testatrix that the interest bequeathed to the said niece should be used for her support or that she should have any right therein until she reached her majority.

2. SAME.

Under such a will the minor's guardian was not entitled to remove the property out of the state into the state of the minor's residence, although the rule is generally that the *situs* of a minor's estate is fixed by its domicile.

110 Miss.]

(775)

APPEAL from the chancery court of Adams county.
HON. R. W. CUTREER, Chancellor.

Petition by J. B. Sullivan, guardian against A. H. Geisenberger, trustee, to remove a personal estate bequeathed to a minor from the state. From a decree denying the petition, petitioner appeals.

The facts are fully stated in the opinion of the court.

Sullivan, Conner & Sullivan, for appellant.

Brandon & Bowman, for appellee.

STEVENS, J., delivered the opinion of the court.

The appellant, J. B. Sullivan, nonresident guardian of Ellen Green Sullivan, a minor, prosecutes this appeal from a decree of the chancery court of Adams county, denying the petition of the guardian to order the removal of a personal estate bequeathed to said minor by one Ellen H. Green, deceased. It appears that Ellen H. Green, of Natchez, Miss., executed her last will and testament, in which, among other bequests, appears the following:

"To my namesake and cousin, Ellen Green Sullivan, I give and bequeath the sum of five hundred dollars per annum until she becomes twenty-one years old; and I direct that my executor invest the same each year for her on interest in dividend bearing property, yielding if possible not less than six per cent. per annum; and I direct that said principal with all accumulated interest and dividends thereon, be paid over to her when she reaches the aforesaid age of twenty-one years; but should she die before she, the said Ellen Green Sullivan, reaches the age of twenty-one years, then in that event the aforesaid bequests and accumulated interest thereon shall descend to the heirs at law of the said Ellen Green Sullivan."

After the death of Mrs. Green her will was probated, her executor qualified, her estate was administered upon,

and her executors finally discharged without accounting for the bequest made to this minor. Thereafter a suit was instituted against the executor, the administrator c. t. a., the heirs or devisees of Mrs. Ellen H. Green, deceased, by and on behalf of the minor, Ellen Green Sullivan, who was then residing with her father, J. B. Sullivan, in Reeves county, Tex. This suit was compromised by all the parties, by and with the approval of the chancellor, and a decree was entered, allowing the minor seven thousand dollars as her full share of the estate of Mrs. Green, directing that two thousand dollars be paid in cash and five thousand dollars be evidenced by the promissory note of certain of the devisees, payable two years after date, with interest, and secured by deed of trust on certain property in the city of Natchez. Thereafter, and before the maturity of this promissory note, J. B. Sullivan, the guardian of the minor, presented his petition to the chancery court of Adams county, alleging that he was the father and guardian of the minor; that the minor and petitioner were both living in Reeves county, Tex.; averring the ownership by the minor of the seven-thousand dollar estate; claiming the right of the guardian to the possession and control of the estate; and asking for its removal, under the procedure outlined by statute, from the chancery court of Adams county to the probate court of Reeves county, Tex. When the suit instituted by the minor against the Green estate was compromised, the court appointed A. H. Geisenberger as trustee under bond to receive, invest, and account for the estate, under the direction of the court. The record reflects that J. B. Sullivan was duly appointed guardian by the probate court of Reeves county, Tex., qualified as such, and gave a fifteen thousand dollar bond, and in his inventory charged himself with the value of the minor's estate then in the hands of Geisenberger, trustee. No point is made in this appeal about the regularity of the proceedings to have the estate removed; but the right

of the nonresident guardian to remove the estate at all until the minor reaches the age of twenty-one years is challenged. The court, upon the answer of Geisenberger, trustee, entered a decree, dismissing the petition of J. B. Sullivan, guardian, and thereby denying the right of the guardian at this time to the possession of said estate.

We construe the will of Ellen H. Green as providing an estate to be delivered over to her cousin, Ellen Green Sullivan, when, and not before, she reached the age of twenty-one years, and imposing upon her executor the duty and trust of investing the five hundred dollars annually and reinvesting the income and profits of the estate from year to year until the minor reached the age of twenty-one years. But should the minor die before she reached the age of twenty-one years, then, by the express provisions of the will, the estate, with all accumulations thereon, should go to the heirs at law of the minors. The devise is in fee to the minor, but subject to be defeated by her death before she reaches the age of twenty-one years. Other provisions of the will evidence a purpose and desire that her residence in Natchez be kept and maintained as a family home for all her children until the youngest is twenty-one years old; that a portion of the income of the estate be spent in the support, maintenance, and education of her minor children; that there should be no division of the estate until all her children are of age; and that her plantation should be operated by the executor with full power on his part to employ necessary help and enter into contracts in the due operation of the business of the estate. There was no duty primarily resting upon the testatrix to support and maintain this minor during her infancy; and aside from any necessity which might now confront the minor in the way of support, maintenance, and education, we must look to the language of the bequest to determine its meaning and legal effect. Looking to this language, we find an

express provision of the will that these annuities, with accumulated interests, are to be turned over to the minor when she reaches the age of twenty-one years, and if she should die before she reaches majority, a contingency arises which casts the whole fee of this bequest upon the minor's heirs at law. By the terms of the will, the chancery court where the will is being administered upon is charged with the trust of seeing that these annuities are properly invested in accordance with the direction of the will, and in the event of the death of the minor before she reaches twenty-one years of age, that court will be called upon to ascertain who is entitled to the estate as heirs at law of the minor.

Under this view of the will, the minor is not entitled, through her guardian, to the present possession of any portion of the estate, and is not even awarded the right to use the income for her maintenance, education, and support. If she had the right to immediate possession and the use of this estate, then a different case would confront us. We are mindful of the rule that ordinarily the *situs* of a minor's estate is fixed by the domicile of the minor, and that comity between states requires, ordinarily, the removal, from this state to the domicile of the minor, of any of the minor's property situated in this state. This is the evident purpose of our statute providing the procedure for removal in such cases; but, in the present case, the chancery court of Adams county had acquired jurisdiction over the fund in question, and was charged with the duty of seeing that the fund was properly invested, and that it should ultimately go to the legatees entitled thereto; and this will ultimately be determined by the contingency mentioned.

The ruling of the chancellor was correct, and his decree is affirmed, and, of course, without prejudice to the right of the minor to renew her application when she reaches her majority.

Affirmed.

EDDINS v. STATE.

[70 South. 898.]

1. JURY. Challenges to panel. Grounds, criminal law. Change of venue. Local prejudice.

Where on the trial of a murder case the sheriff and the circuit clerk who took part in the selection of the venire for the week from which was selected the grand jury and the trial jury, were kinsmen of the deceased, and a majority of the names put into the jury box were persons residing in the supervisor's district in which the homicide occurred, on motion the court should have quashed the jury box.

2. CRIMINAL LAW. Change of venire. Local prejudice.

When the atmosphere in a county was not such as would insure a fair trial to a person charged with murder he had a right to a change of venue, especially when the sheriff and the circuit clerk who took part in the selection of the venire were kinsmen of the deceased, and a majority of the names put into the jury box were persons residing in the supervisor's district where the homicide occurred, and where after, the venire was quashed on defendant's motion, a new venire was ordered and the sheriff proceeded to summon fifty-five of the same men, thereby compelling defendant to select a jury from the very men he had rejected to their knowledge.

APPEAL from the circuit court of Jasper county.

HON. W. H. HUGHES, Judge.

The facts are fully stated in the opinion of the court.

Wells, May & Sanders, McFarland & Brown and McBeath & Miller, for appellant.

Lamar F. Easterling, Assistant Attorney-General, for the state.

Cook, P. J., delivered the opinion of the court

We have read the evidence in this case with great care, and, taking the view of the state, we believe that

the jury was warranted in finding the defendant guilty of murder.

If each assignment of error is considered alone, and without reference to the other alleged errors of the court, it may be that the judgment of the trial court would have to be affirmed.

If we take the record as a completed history of the trial, and consider every incident thereof in its relation to the whole, we find ourselves impressed with a belief that appellant did not, and could not, have obtained a fair consideration of his case by an impartial jury to be drawn from the district of the county in which he was tried.

In the first place the sheriff and the circuit court clerk who took part in the selection of the venire for the week, from which was selected the grand jury and the trial jury, were kinsmen of the deceased. In the next place, it was shown that a majority of the names put into the jury box were persons residing in the supervisor's district in which the homicide occurred. In the third place, the court refused to quash the jury box, which was error, but after a venire to try defendant was drawn from that box—an unlawful box—the court, upon motion of defendant, quashed the venire, and announced to the veniremen then sitting in the court-room that they were not excused, but they would “sit steady in the boat,” or words to that effect. A new venire was ordered, whereupon the sheriff, a kinsman of deceased, proceeded to resummon fifty-five of the same men to try the defendant. This, every lawyer will appreciate, was a serious blow to the defendant, being compelled to select a jury from a lot of men whom he had rejected, and who knew he had, in effect, said he did not want on a jury to try his case. Previous to this unfortunate incident, and in the early part of the game, the defendant had asked for a change of venue, which had been overruled by the court, whereupon, appreciating that he was “up against it” if he should be com-

pelled to select a jury from the very men he had openly discarded, the defendant renewed his motion for a change of venue, which was again promptly overruled. We are constrained to believe that the court "held the defendant's nose to the grindstone," at every step in the case. Looking over the record of the evidence taken on the motion for a new trial, we are impressed with the thought that the court unwittingly resolved every doubt against the defendant, and the reason for his having done so is probably to be found in this statement from the bench. The judge had evidently sounded public opinion, and he did not hesitate to say that his own investigations led him to believe that the public had not prejudged the defendant's case. The learned judge seemed to be impressed with the idea that a change of venue would, in some way, reflect upon the well known civic virtue of the citizenry of the good county of Jasper. It is obvious that the judge weighed his own opinion against that of the sworn witnesses, and as we are all human, and a circuit judge especially has a rough and rocky road to travel, we are not disposed to criticize the judge for believing that the witnesses who said defendant could not get a fair and impartial trial in that jurisdiction were mistaken. There was evidence, of course, to sustain the ruling of the court; and, if we segregate this point from the entire case, we would, no doubt, affirm this case.

The writer, particularly, has every reason to sympathize with a trial judge, and to appreciate the nervous strain that he undergoes in an endeavor to uphold the majesty of the law, and nothing said in this opinion is to be taken as a criticism of the trial judge in this case. The circuit judge may, after all, have been right in his conclusions, but we must take the case as it appears to us, and, in doing so, we are thoroughly convinced that the atmosphere in Jasper county was not such as would insure a fair trial to the defendant. The facts of the present case are unique, and we are of opinion that the

trial court should have sustained the motion for a change of venue.

There are many things in this record which could be mentioned in support of this view; but, as this case will be retried, we refrain from commenting upon the evidence.

The right to trial by an impartial jury is guaranteed by the organic law of the state, and when it is doubtful that such a jury can be obtained in the county of the venue of the homicide, the person on trial for his life is but asking for his rights when he requests a change of venue, and there is no imaginable reason to refuse, except, possibly, a slight additional cost to the county.

Reversed and remanded.

P. E. PAYNE HARDWARE CO. v. INTERNATIONAL HARVESTER CO., BARNES INTERVENER.

[70 South. 892.]

1. RECEIVERS. Property affected. Time of appointment. Assets. Claim of third persons.

The right of a receiver became fixed at the date of his appointment, and his title accrues at that time, and liens and priorities of creditors, properly acquired before the appointment of the receivers, will not be disturbed by the receiver.

2. SAME.

The receiver represents the creditors as well as the stockholders, and holds the property for the benefit of both, he is trustee for both, and as trustee for the creditors can maintain and defend actions which the corporation could not.

3. RECEIVERS. Assets. Claims of third persons.

Under Code 1906, section 4784, providing that if a person transacts business in a company name, and fails to disclose the name of his partner by a conspicuous sign at the house where the business is transacted, the property used or acquired in the business shall,

as to the creditors of such person, be liable to his debts. Where the goods of a harvester company were placed in the storehouse of a hardware company which acted as its agent, behind the sign of the hardware company, the business being conducted by the hardware company and the goods apparently formed a part of the regular stock of merchandise, there being no sign of the harvester company except an advertisement of the hardware company that it carried the products of the harvester company as part of its stock in trade. In such case the property belongs to the hardware company as to creditors, and a receiver of the hardware company is entitled to possession thereof, notwithstanding that previous to the appointment of the receiver the harvester company had instituted an action for the property and had given bond and taken possession of the same.

APPEAL from the circuit court of Pike county.

HON. D. M. MILLER, Judge.

Suit by the International Harvester Company against the P. E. Payne Hardware Company in which Joe Barnes as receiver of the hardware company intervened, from a judgment for plaintiff, defendant and intervenor appeal.

The facts are fully stated in the opinion of the court.

Mixon & Cassidy, for appellant.

J. S. Sexton and *V. M. Roby*, for appellee.

COOK, P. J., delivered the opinion of the court.

The Payne Hardware Company was engaged in the mercantile business in the town of Tylertown, and P. E. Payne was the manager of the business. This company handled, as local agent of the International Harvester Company, gasoline engines and a line of agricultural implements. In December, 1912, P. E. Payne, the president and active manager of the business, abandoned the business and left for parts unknown. On December 21, 1912, the Harvester Company sued out a writ of replevin, and it was levied on the engines, machinery, and implements in the custody of the Hardware Company. The Hardware Company failing to give

bond, the Harvester Company executed a bond, took possession of the property, and removed same from the place of business of the Hardware Company. Some weeks after the seizing of the goods under the writ of replevin, the chancery court, upon the petition of the general creditors of the insolvent Hardware Company, appointed a receiver for the insolvent Hardware Company. The receiver, by leave of the chancery court, intervened in the replevin suit, and propounded a claim to the property levied on as a part of the assets of the insolvent corporation of which he was receiver. The issue thus made was fought out before the court, and resulted in a judgment for the Harvester Company; hence this appeal.

The receiver contends that the property in issue was "used or acquired" in the business of the Hardware Company, "and as to the creditors of any such business" the property should be treated as the property of the Hardware Company and liable to be taken for its debts. In other words, the receiver claimed the property as assets of the Hardware Company, and that he was entitled to the possession of same for the benefit of the creditors. This again brings into play our "sign statute," which is section 4784, Revised Code 1906, and is in the following words:

"If a person shall transact business as a trader or otherwise, with the addition of the words 'agent,' 'factor,' 'and company,' or '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to be read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

Opinion of the court.

[110 Miss.]

The Harvester Company contended below, and contends here, that the receiver could not propound this claim, and, if he could, the statute does not apply to the facts of this case. To make clear the position of the Harvester Company, we quote from the brief of its counsel as follows:

"There can be no controversy as to the time when the right, authority, and possession of a receiver vests. The authorities are uniform on this subject, and it would be but burdening this brief to quote numerous citations supporting the well-known rule that the powers and rights of a receiver are fixed as at the date of his appointment. But we respectfully make reference to the language of a few decisions here mentioned, which, without question, disposes of the contention of counsel for the receiver that the latter is entitled to the possession of the property sought to be recovered by him in this action, which was not in the custody, use, or control of the Payne Hardware Company at the time of the appointment of the receiver, but, on the contrary, had by due process of law been reclaimed by its owners three weeks before the petition seeking the appointment of a receiver was ever filed.

"34 Cyc. 199, par. 4: 'The receiver's rights become fixed at the date of his appointment; his title accrues at that time, and thenceforward at the furthest the property is *in custodia legis*; so that other creditors up to that time may pursue their legal remedies and acquire liens and priorities, the order of an appointment not relating back to the commencement of the suit as against third parties.' "

It is very true that the rights of a receiver become fixed at the date of his appointment, and his title accrues at that time, and liens and priorities of creditors, properly acquired before the appointment of the receiver, will not be disturbed by the receiver. It will be noted, however, in the present case, that the Harvester Company does not come into court, and did not replevy the

goods, as a creditor of the insolvent Hardware Company. It claimed, and claims, the goods as the owner of same. There is no question here of prior liens. The Harvester Company does not claim to be a prior lienor, or a preferred creditor; but, to the contrary, it claims to be the owner of the goods in controversy, and upon this claim it must stand or fall. So, taking out of this case, as we must, all questions of a contest between creditors, we find the case simply this and nothing more: The receiver claims the property because he says it was acquired in the business of the corporation, formed a part of its stock in trade, and in the absence of a sign showing that the goods in question were not the property of the Hardware Company it will be treated as the property of the Hardware Company in favor of its creditors; that he, as receiver, appointed by the chancery court, not only represents the corporation, but its creditors as well, and that by his appointment as receiver he was vested with powers to take into his possession all of the assets of the corporation, and was expressly authorized by the court to intervene in this suit, for the purpose of contesting with the plaintiff in replevin the ownership of the property. If, as to creditors, this property belonged to the mercantile corporation doing business in Tylertown, by virtue of our statute (section 4784, Code 1906), he, the receiver, is entitled to the possession of same. This position of the receiver seems to be sound in law, as well as in fact.

The facts are, without dispute, that the goods in question were placed in the storehouses of the Hardware Company, behind the sign of the Hardware Company—the business was conducted by the Hardware Company—and the goods here involved apparently formed a part of the regular stock of merchandise. The sign which it is alleged disclosed the ownership of the Harvester Company was, at best, merely an advertisement of the Hardware Company, that it carried the products of the Harvester Company as a part of its stock in trade.

In other words, the sign of the Harvester Company was merely an advertisement of the Hardware Company, and did not in any way disclose the private agreement between the Hardware Company and Harvester Company that, as to the parties to the contract, the goods would remain the property of the Harvester Company. As to the law of the case, we quote as follows:

"The receiver represents the creditors, as well as the stockholders, and holds the property for the benefit of both. He is the trustee for both, and, as trustee for the creditors, can maintain and defend actions which the corporation could not. *Franklin National Bank v. Whitehead*, 149 Ind: 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302. The receivers, representing both the creditors and the defendant, have the right to assert any defense to which the creditors, in contradistinction to the defendant, are entitled. *Hamor v. Taylor-Rice Engineering Co.* (C. C.), 84 Fed. 393. But so far as his powers are derived from a statute, or from a lawful decree of court, and the powers do not involve rights which, at the time of his appointment, were vested in such owners, he is not merely their representative, but is the instrument of the law and the agent of the court which appointed him. Such right and authority as the law and the court rightfully give him he possesses, and in respect to such right he is not circumscribed and limited by the right which was vested in and available to the owners."

Among the numerous decisions of this court construing section 4784 of the Code of 1906, we have not been able to find any case precisely in point; but we are convinced that this case comes within the control of said section of our Code, and that the property in question, in so far as the creditors of the Hardware Company are concerned, will be conclusively held to be the property of the Hardware Company. It follows that in our opinion the court below erred, and the case is therefore reversed and remanded.

Reversed and remanded.

RIVES ET AL. v. BURRAGE ET AL.

[70 South. 893.]

1. *WILLS. Construction. Estate conveyed. Intent of testator. Life estate. Rights of remaindermen.*

The cardinal rule of construing a will and the dominant purpose of courts should ever be to discover the testators' intentions and when it is discovered, it should be given effect.

2. *WILLS. Construction. Estates conveyed. Life estate.*

Under a testator's will which gave his wife all his property for her natural life, with remainder to his children, and provided by a codicil that at his death she shall hold and enjoy all his property, not for life merely, but absolutely as her own property, with full power to dispose thereof and further providing that property as to which she should not exercise the power should go to her children in remainder. In such case the wife took merely a life estate in the property she did not consume or otherwise dispose of during her life, the codicil being added merely for making clear the power of his wife to convey an indefeasible title to the property should she think it advisable to dispose of it during her life.

3. *WILLS. Estate created. Right of remaindermen.*

Where a testator left his property to his wife for life with full power of disposition during her life, she could not defeat the right of the remaindermen by selling the devised property and investing the proceeds in other property, whether intentionally or through misinterpretation of the will.

APPEAL from the chancery court of Copiah County.

HON. P. Z. JONES, Chancellor.

Bill by H. W. Rives executor and others against F. D. Burrage and others. From a decree for defendants on demurrer, plaintiffs appeal.

The facts are fully stated in the opinion of the court.

W. H. Rives, R. H. & J. H. Thompson and R. N. Miller, for appellants.

McNeil & Loeb, for appellees.

Cook, P. J., delivered the opinion of the court.

Appellants, the executor and surviving children of R. G. Rives, deceased, filed their bill in chancery in the chan-

cery court of Copiah county, in 1913, for the purpose of securing possession of certain real and personal estate and choses in action which they claimed under the will of R. G. Rives, which was duly probated in Noxubee county, the county in which he resided at the time of his death. Appellee, F. D. Burrage, claimed the property under a will executed by Mrs. Amanda Rives, widow of R. G. Rives, shortly before her death in Copiah county, and shortly thereafter offered for probate by F. D. Burrage, who was named as sole devisee and executor without bond. In their bill appellants set out the will of R. G. Rives, under which they claim, and their rights depend upon the construction of that will. Appellees entered demurrer to the bill, which was sustained by the chancellor, and leave was given for an appeal that the principles involved might be settled. On the part of appellants it is claimed that, under the will of R. G. Rives, his widow, Amanda, took a life estate, with a power of disposal during her life, with remainder to certain named children, to whom was devised whatever might remain of the property undisposed of at her death. The contention of appellees was that the power of disposal given by the will converted the life estate into a fee, with which the attempted devise in remainder was inconsistent, and that the latter should be disregarded. A further contention was that, if the will should be so construed as to have vested only a life estate in the widow, Amanda, she could, by changing the form of investment during her life, take the proceeds in fee, thereby converting the life into a fee simple subject to her disposal by will, to take effect after her death. The original will of R. G. Rives was executed on the 11th day of March, 1891, and contained the following provision with reference to his wife, Amanda F. Rives:

“I desire she should take, for her natural life, all of such property and effects as I may own at my death, whether exempt from execution under the law, or not.

this to include not only all property of every kind, but all money, claims and choses in action of every kind. I wish her to use and enjoy all of the same as her own for her natural life, knowing that she will permit and encourage any and all of my unmarried children to enjoy the homestead and other property and effects with her, she controlling same as the mother and they rendering her due respect and obedience as children; and knowing also she will pay out of my effects such other debts as I may owe as far as she can do so without reducing such effects to less than six thousand dollars in value; but a life policy taken out by me for her benefit is not to be considered as any part of my effects as far as my creditors are concerned. I will and desire that, at the death of my wife, all my property of every kind and all my effects of every kind shall go to my children in equal parts, share and share alike, the heirs of my deceased children to take his or her share."

Amanda F. Rives and the two sons of the testator, Henry W. and Joel E. Rives, were nominated executors, to qualify without bond or security, and they were empowered to sell any property of the estate, publicly or privately, for cash or on time as they might think best. By a codicil dated September 13, 1892, the son, J. E. Rives, was given all of the law books and all office furniture, on condition that he should finish up all cases and business in which he and the testator were engaged as partners at the time of the death of the testator, and account for and pay over to the executors the testator's part of the fees in the same manner and to the same extent that the testator would have been entitled if living. On the 1st day of August, 1894, shortly before the death of R. G. Rives, he executed another codicil containing the following provision:

"At my death I wish my wife, Amanda F. Rives, to hold and enjoy not for her life merely, but absolutely as her own property, subject only to the provisions herein-

after stated, all of my property, real and personal, including all my homestead and other exempt property and all choses in action, rights, credits and equities, as fully and completely as if she had lawfully and right-fully purchased the same and held it as an innocent purchaser for value without notice. But while this is intended to give her the full right to hold, sell, give away or otherwise dispose of any or all of such property, so that the same shall vest absolutely and without limitations in the taker under her, yet, if as to any of such properties she shall not exercise such rights of disposition to take effect during her life, then such property shall at her death inure to the benefit of any descendants in the following manner, to wit.”

Then follows the devise in remainder to his children, Lucy, Agnes, and Robert one-fifth interest; and to Henry and Joel E. each one-fifth, in trust for their respective descendants, to be held and used as they might, respectively, deem advisable for the beneficiaries.

If we take the clause in the original will alone, it seems clear that the deviser only intended that his wife should take a life estate in the property devised, with power to use and enjoy it if necessary. This codicil, we think, was added merely for making clear the power of his wife to convey an indefeasible title to the property should she think it advisable to dispose of it during her life. If we are to look to the will as a whole to discover the purpose and intention of the testator, we find but little difficulty in the way of a satisfactory conclusion. It is evident that Mr. Rives had perfect confidence in the judgment and justice of his wife; he wanted her to take control of all his property and use and enjoy it during her life even to the extent of consuming the entire estate. If she did not use or dispose of any part of the estate before she died, the part undisposed of would go to his children. This will is essentially the same as the will construed by this court in *Murdoch v. Murdoch*, 97 Miss. 690, 53 So. 684. Speaking for the court in the *Murdoch Case*, Mayes, C. J., used

the following language which we think fits exactly in the instant case:

"The testator reposed confidence in his wife, and believed that she would not waste the estate, and would make conveyance of same only when necessary; but the absolute dominion over the property was left with the wife. If she consumed it, there was no power resting anywhere to prevent, after the coexecutors refused to act. The will expressly provides that no inventory shall be taken of the estate. It provides that the wife has the right to sell any of it as may be for the best, and she is the sole judge of that. It further provides that no account is to be kept of the disposition or management of the property—'my wife to have full use, and manage it the best she can, with the advice of the two co-executors.' All that the testator leaves to his brothers and sisters is 'what is left of the property' after the death of Mrs. Murdoch. Mrs. Murdoch does not take the property in fee, but she did take it with full authority to consume the whole estate, if she so desired, and without the power of anybody to put a stop to it."

Construing a will very like the will in the present case, this court said:

"Taking the will by its four corners and construing it as a whole, it is clear that the testator did not mean to vest his wife with power to dispose of the property by will, but that what he did mean is simply this: That his wife should have the use and enjoyment of the property during her lifetime, with full power to mortgage or sell it, and that in event it, or any portion thereof, should not be sold by her, it should be divided after her death . . . among his children." *Hannah L. Selig v. William Trost et al.*, 70 So. 699.

In the case just quoted the court said further:

"If it were permissible to construe the two clauses of it separately, and by so doing to hold the first to be a devise in fee, the limitation over contained in the second clause would be valid as an executory devise."

This expression of the court is peculiarly applicable to the will under review, and whether it can be properly called an executory devise is doubtful, but nevertheless the cardinal rule of construction and the dominant purpose of courts should ever be to discover the testator's intention, and, when it is discovered, it should be given effect.

We think it must be said that the testator in the present case reposed a trust and confidence in his wife, and gave to her the power to dispose of any of his property to take effect during her life; and we are quite satisfied that her estate in the property was a life estate only.

The bill alleges that Mrs. Rives sold some of the property and reinvested the proceeds in other property; and the remaindermen ask the court to vest the title of that property in them. What we think about this will we have set forth above, and we do not think the widow could defeat the will of her husband by resorting to the device of selling the property devised and putting the proceeds in other property. A mere change of form will not have the effect of defeating the manifest intention of the testator to give his children what was left after his wife's death. If Mrs. Rives sold any of the property for cash and invested the money in other property for the purpose of defeating the intention of her husband and robbing his children, or through a misinterpretation of the will, neither the one nor the other can destroy the rights of the children. If this could be done the wife could have nullified the will by converting into cash the entire estate within a month after her husband's death and investing the money in real estate. The wife could not will the property devised, nor can she will other property which she bought with the proceeds of sales of property in which she had only a life estate, and which she did not consume or otherwise dispose of during her life.

The demurrer should have been overruled.

Reversed and remanded.

PARSONS-MAY-OBERSCHMIDT Co. v. FURR ET AL.

[70 South. 895.]

1. JUDGMENT. *Conclusiveness. Matters concluded. Appeal and error. Supersedeas bond. Statute. Construction. Principal and surety. Liability on.*

Where in a suit to enjoin a sale under a deed of trust, the grantors appealed and gave a *supersedeas* bond and in the appellate court the sureties on the bond moved to discharge it, because they had been misled into signing it, and had, before the bond was approved, notified the clerk not to approve it, and the supreme court declined to entertain the motion on the ground that such matters could not there be adjudicated in the first instance; in such case such ruling did not preclude the sureties from subsequently filing a bill in the lower court to vacate the bond and annul the judgment thereon.

2. APPEAL AND ERROR. *Supersedeas bond. Statute. Construction.*

Under Code 1906, section 1022, providing that "when a bond, recognition, obligation, or undertaking of any kind shall be executed in any legal proceeding, or for the performance of any public contract, or for the faithful discharge of any duty, it shall inure to the person to whom it is designed by law as a security, and be subject to judgment in his favor, no matter to whom it is made payable, nor what is its amount, nor how it is conditioned, and the persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had the effect in such proceeding or matter which a bond or other undertakings payable and conditioned as prescribed by law, would have had, and where any such bond or undertaking is not for any specified sum, it shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given." where a *supersedeas* bond is for a lesser or greater amount than that prescribed by law, the court is not authorized to render judgment for any amount which might have been required, but shall only render judgment for such amount as is authorized by the term of the bond and rules of equity.

3. PRINCIPAL AND SURETY. *Appeal and error. Supersedeas bond. Liability on.*

Where all of the sureties but one had signed a *supersedeas* bond, the principal raised the amount, and then procured the signature of an additional surety, none of the sureties are liable for a greater sum than that originally fixed, notwithstanding Code 1906, section 1022, relating to judgments on bonds, for the one who signed after the penal sum had been raised, had the right to presume that the preceding sureties were for the raised sum and would contribute equally in payment of any amount awarded, while the original sureties, of course, were liable for the amount agreed upon.

APPEAL from the chancery court of Lincoln county.
HON. G. G. LYELL, Chancellor.

Suit by W. H. Furr and others against the Parson-May-Oberschmidt Company. From a decree for complainants, defendants appealed.

The facts are fully stated in the opinion of the court.

Whitfield & Whitfield, for appellant.

Jones & Tyler, for appellees.

COOK, P. J., delivered the opinion of the court.

This suit was begun in the chancery court of Lincoln county, and is the sequel of a judgment of this court in the case of *Geo. T. Douglas et ux. v. Parsons-May-Oberschmidt Co.*, 101 Miss. 620, 57 So. 624. In the former case the appellees in this appeal made a motion to discharge the *supersedeas* bond, which motion was overruled, the court stating:

"It may be, as stated by the bondsmen, that they were misled by appellant into signing the bond, and that one of them notified the clerk, before the bond was filed, not to approve the same; but these matters cannot be adjudicated on this motion, or, for that matter, by this court on original proceeding here."

The appellees here were the sureties on the *supersedeas* bond in the case from which we have quoted the

above statement of this court. This suit was begun in the chancery court by the sureties on the *supersedeas* bond in the former case, after this court had rendered a judgment against them for the reason stated by the court. We think this court declined to entertain the motion to discharge the *supersedeas* bond because the matters of fact alleged in the motion were *aliunde* the record, and that this court could not inquire into the merits of the motion. So it was, after the decision of this court, the sureties filed an original bill in the chancery court, alleging the same causes, practically, for having the judgment annulled that were alleged in the motion made in this court on the original appeal. In other words, the sureties on the *supersedeas* bond have gone to a court which has the machinery to inquire into the merits of their contention. The chancery court sustained the contention of the sureties and canceled the bond; hence this appeal.

The facts developed on the trial are about as follows: On or about January 4, 1911, appellant in the original case prepared an appeal *supersedeas* bond, in which the penalty and amount was fixed at two thousand nine hundred and two dollars and sixty-one cents, and appellees, C. L. Burgess, W. H. Furr, and T. M. Smith, signed this bond. After this bond was signed, Douglas, the principal, changed the penalty from two thousand nine hundred and two dollars and sixty-one cents to eight thousand six hundred dollars, without the knowledge of the sureties who had signed the bond. After the penalty was changed, C. T. Montgomery signed the bond as a surety, not knowing that the penalty had been changed. There is some evidence going to show that some of the sureties told the clerk to strike their names from the bond, but this was not done. A proper interpretation of section 1022, Code of 1906, will dispose of this case. This section we quote, viz.:

“When a bond, recognizance, obligation, or undertaking of any kind shall be executed in any legal pro-

ceeding, or for the performance of any public contract, or for the faithful discharge of any duty, it shall inure to the person to whom it is designed by law as a security, and be subject to judgment in his favor, no matter to whom it is made payable, nor what is its amount, nor how it is conditioned; and the persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had the effect in such proceeding or matter which a bond or other undertaking, payable and conditioned as prescribed by law, would have had; and where any such bond or undertaking is not for any specified sum, it shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given."

Paraphrasing the first part of this section it amounts to this: When a bond is executed in any legal proceeding, if such bond had the effect in such proceeding that a bond payable and conditioned as prescribed by law would have had, the person executing such bond will be liable to a decree or judgment thereon, "no matter to whom it was made payable, nor what is its amount, nor how it is conditioned." The balance of the section refers alone to bonds in which the amount of the penalty is entirely omitted, and declares that in such case:

"It shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given."

It will be noted that the statute provides for the judgment on bonds that are for *no* "specified sum," but does not provide for the amount of the judgment to be taken upon bonds where the amount is less or more than the amount prescribed by law. It merely says that a judgment may be taken on such bond, "no matter to whom

it may be payable, nor what is its amount, nor how it is conditioned." It would seem, in the interpretation of this statute, that we should apply the maxim "*Expressio unius est exclusio alterius*." The statute in one state of the case expressly prescribes the amount of the judgment to be entered, and in the other case does not prescribe the amount for which judgment or decree may be given. It thus seems that it was left to the court to render such judgment or decree as is authorized by the terms of the bond and rules of equity.

In this case, the sureties agreed to bind themselves to pay a fixed amount, viz., two thousand nine hundred and two dollars and sixty-one cents, in case their principal should lose his case. This is clear, so far as the first signers are concerned; and we think those who signed after the amount of the penalty was raised should not be bound for more than the original penalty of the bond. Those who signed after the amount of the penalty was raised from two thousand nine hundred and two dollars and sixty-one cents to eight thousand six hundred dollars had a right to presume, in the absence of anything to put them on guard, that the signatures preceding their own were, in fact, made with the knowledge that they each were bound for the raised sum appearing in the bond. Differently stated, the subscribers last signing the bond believed that the signers preceding him would contribute equally the payment of whatever decree the appellate court might thereafter render against their principal, to the amount of the penalty of the bond signed by him.

Now, we believe that the last signer should be held to the same liability that his co-obligors are required to pay. We also believe that, under our statute, the judgment or decree should not be for the full amount for which a bond of this character might have been required in the state of case in which it was given; but the liability of the sureties should be limited to the amount which they expressly obligated themselves to

pay, to wit, two thousand, nine hundred and two dollars and sixty-one cents, and legal interest. The very interesting and exhaustive discussion of our own cases and the decisions of sister states upon our own and similar statutes are helpful; but inasmuch as we believe that this case must be decided by an interpretation of our statute, we have not seen fit to cite any decision of any court, none being called to our attention which decides the precise point here involved.

Our interpretation of the statute being, as before stated, that, inasmuch as the *supersedeas* bond was for a specified amount, the lower court should enter a decree against the appellees for the amount specified in the bond. There was much evidence taken which was irrelevant, but it is clear that all of the sureties signed the bond for the purpose of superseding the decree, and that the bond accomplished this result.

Reversed and remanded for decree in accordance with this opinion.

Reversed and remanded.

GULF & S. I. R. R. Co. v. DIXON.

[70 South. 898.]

CARRIERS. *Carriage of passengers. Special trains.*

While a railroad company had for several years allowed passengers to board its excursion trains to the state fair at a flag station, it may change its rules and refuse to receive passengers on such special trains, except at its agency stations where tickets could be procured, and a plaintiff cannot complain that he was refused passage on such special train at a flag station, though the train had stopped when flagged at such a station.

Suit by M. W. Dixon against the Gulf & Ship Island
APPEAL from the circuit court of Smith county.

HON. W. H. HUGHES, Judge.

Railroad Company. From a judgment for plaintiff, defendant appealed.

The facts are fully stated in the opinion of the court.

T. J. Wills, for appellant.

The question presented to this court for determination is whether or not appellant railroad company had a right to run its excursion train from Laurel to Saratoga on October 25, 1912, stopping only at agency stations for passengers provided with excursion tickets, to Jackson and return, issued for that particular train.

It is a well settled rule of law that in running of regular trains on regular schedule by a railroad company, that the company has the power and authority under the law, unless otherwise provided by statute, to determine for itself what trains shall stop at designated stations or places, and what trains may be run scheduled to stop only at certain particular stations on its line, in other words, a railroad company may enforce a rule of stopping certain trains at all stations for the receiving and discharging of passengers, and then may run other trains which do not stop at all stations without incurring any liability whatsoever for the failure to stop at intermediate stations between the stations, which the train is scheduled to stop. *Wells v. Ala. & Great So. R. R. Co.*, 67 Miss. 24; *Nobel v. Atchison T. & S. F. R. R. Co.*, 46 Pac. 483; *Louisville & Nashville R. R. Co. v. Miles*, 37 So. 486; *Tex & Pac. R. R. Co. v. Bell*, 87 S. W. 730.

Appellant railroad company, as is shown by the record, in this case, had its regular passenger train run on the regular schedule each day, which would stop at this flag station, of Bunker Hill, and receive and discharge passengers upon receiving the proper signal so to do. Appellee could have procured passage upon the regular train

at this flag station as was usual and customary for passengers to do, upon giving the proper signal. The excursion train had no schedule upon which it was run other than that evidenced by the circular sent out advertising the running of said excursion to carry intending visitors to the State Fair at Jackson. This excursion circular listed the agency stations on the said Railroad line between Laurel and Saratoga, but no reference whatever was made to the non-agency stations and flag stations. Appellee could not rely upon the schedule for the regular train as the basis of his right to take passage on the excursion train at the flag station of Bunker Hill. He had no ticket entitling him to passage on the excursion train, and appellant owed him no contractual obligation to stop its train and receive him as passenger, and the excursion train not having a regular train schedule to stop at Bunker Hill crossing, the flag station, there was no legal obligation upon appellant to stop its train and receive appellant as a passenger on the said train. Appellant railroad company owing appellee no contractual obligation to stop its said train and receive him at the flag station, and there being no legal duty imposed upon it to stop its train at said flag station for appellee, it was under no obligation whatsoever, either by contract or law, to have its said train stop and receive appellee, and therefore its failure to so stop would not impose upon it any liability whatever, and appellee was not entitled to recover.

Nobles & Cantwell and G. G. Lyell, for appellee.

We call the attention of the court to the case of *Wilson v. Railroad Company*, 63 Miss. 352, where our court held that where Wilson held an excursion ticket good only on trains scheduled to stop at his station, and he flagged a train not scheduled to stop at his station; that the company was not liable under the ticket contract for not stopping, but that Wilson had rights outside his contract, as a member of the general public and the company was

liable for not stopping on his flagging the train in question. The court said:

"The contract did not preclude appellant from paying the fare or traveling on the train like any other citizen. It is shown the train in question would and should have stopped at Barnett if it had been signaled for that purpose." And the railroad company was held to be liable for ignoring the flag of plaintiff under such circumstances.

In 2 Hutchinson on Carriers, section 1110, we read: "So where passenger trains are in the habit of stopping at a flag station whenever proper signals are given, a railroad company is bound to stop a passenger train on a proper signal." See authorities supporting the text. See also *Williams v. Carolina etc. R. R. Co.*, 144 N. C. 498, 12 A. & E. Annotated Cases, 1000 and note; *I. C. R. R. Co. v. Siddons*, 53 Ill. App. 607; *Southern Ry. Co. v. Wallis*, 133 Ga. 553, 12 A. & E. Anno. Cases, 67.

These cases and a multitude of others hold that: "A railroad company is bound to stop its trains in response to proper signals at a flag station at which it is the habit of stopping trains of the kind so signaled."

The proof in this case is so overwhelming and undisputed as to the custom of stopping the State Fair Excursion trains at flag-stops that the appellant is clearly estopped to abrogate such a custom and course of dealing for years without some sort of notice to the public.

The custom cannot be abrogated in the face of twenty people who have flagged the train. Furthermore the train actually stopped and one passenger had gotten on the train step.

We respectfully submit that it is clear that the judgment of the court below should be affirmed.

POTTER, J., delivered the opinion of the court.

M. W. Dixon, the appellee here, was plaintiff in the trial court, and the Gulf & Ship Island Railroad Company, appellant, was defended. From a judgment for two hun-

dred dollars in favor of Dixon, the railroad company appeals.

The facts in this case, stated most favorably to the appellee, are as follows: On the 25th day of October, 1912, appellee flagged one of appellant's trains at a flag stop called Bunker Hill. This train was an excursion or special train, and was carrying passengers at a reduced fare from points on appellant's railroad to Jackson and return. The occasion for the running of this excursion train was the state fair at Jackson. It is shown in the testimony that for several years prior to this time the defendant railroad company had run like excursions through the station in question to the state fair in the fall, and that the plaintiff in this case had boarded these special trains at Bunker Hill and visited the state fair, and that on all previous occasions similar to the one in question the excursion trains stopped in response to signals and had taken on passengers at Bunker Hill. On this occasion circulars had been distributed similar to the ones sent out during previous years. The excursion train stopped for Mr. Dixon on his signal, but the conductor refused to admit him as a passenger because he had an order from the trainmaster to stop only at agency stations to take on passengers. Bunker Hill is not an agency station and tickets cannot be purchased there. The defendant railroad company ran one regular passenger train each way daily; the train going east in the morning and returning in the afternoon.

We are of opinion that the above state of facts do not constitute a cause of action. The defendant railroad company clearly had the right to run this special train or excursion on the occasion of the state fair and take on passengers at agency stations only.

Reversed and dismissed.

MEEK v. HARRIS.

[71 South. 1.]

THREATS. Punitive damages. Right to recover.

Where a mayor commissioner and *ex-officio* justice of the peace acting in good faith and without malice or desire to oppress, informed plaintiff that her minor son was suspected of arson, and in a friendly manner advised her to take him and leave the city, he cannot be held for punitive damages in an action by her for threatening malicious prosecution, if any damages whatever can be recovered.

APPEAL from the circuit court of Jones county.

HON. J. M. ARNOLD, Judge.

Suit by Mrs. Lydia Harris against F. M. Meek. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Deavours & Hilbun, for appellant.

Is the appellant, Meek, liable for an alleged threat to have appellee's son arrested and put in jail, when there is no allegation or proof that there was any attempt to put the threat into execution?

The true rule of law in cases of this character seems to be that if the court has jurisdiction of the person and of the offense charged that there can be no liability unless possibly, as some courts have held, the court is actuated by malice or corruption. The declaration does not allege that defendant had no jurisdiction of either the person or the offense.

In 29 Cyc., page 1443, paragraph 4, the rule is stated thus: "While officers are liable for negligence in the performance of ministerial duties, no such liability is recognized in the case of discretionary or judicial duties. There are generally three classes of officers who are pro-

ted by this rule. In the first place are judicial officers, that is officers holding regular courts for the decision of the cases. These officers when having jurisdiction are never liable for errors or mistakes of judgment, even if actuated by corruption or malicious motives . . . In the third place are the vast number of officers not holding courts, but discharging executive and administrative functions, whose discharge involves the exercise of judgment and discretion; such officers are not liable for a mistaken exercise of such discretion. In many of the cases on the liability of inferior judicial officers, and officers discharging quasi-judicial or administrative functions the opinions would seem to lay stress upon the absence of malice or corrupt intent as an important element in the determination of the immunity from liability. But in most cases what is said in the opinion is merely *dictum*, inasmuch as the actual decision did not recognize the liability." 23 Cyc, page 567, par. d; 28 Cyc., page 466; 1 Dillon on Municipal Corporations (5 Ed), page 771; *Wilcox v. Williamson*, 61 Miss. 310; *Bell v. McKinney*, 63 Miss. 187; *E. B. Thompson v. T. H. Jackson*, 27 L. R. A. 92; *Austin v. Brooman*, 14 L. R. A. 138; *Randall v. Brigham*, 19 Lawyers' Edition (United States Supreme Court Reports), page 285; See 24 Am. St. Rep. 137; *Pratt v. Gardner*, 48 Am. Dec. 625; *Calhoun v. Little*, 31 Am. St. Rep. 254; *Stone v. Graves*, 40 Am. Dec. 131; *Coleman v. Roberts*, 59 Am. St. 11.

The advocate, we are aware, sometimes becomes overzealous in the cause of his client; sometimes his judgment becomes warped. He cannot always be impartial. But we believe a cursory examination and study of this record will demonstrate that the appellant is entitled to a reversal of this case, and we respectfully submit that we cannot understand, we cannot comprehend, that sort of justice that would permit a judgment for any amount to stand against this appellant, who, according to appellee's own evidence, did nothing more than to threaten one who is not even a party to this suit.

Halsell & Welch, for appellee.

Counsel for defendant have been very diligent in this matter, and have tested what they concede to be every weak point in the plaintiff's case, and it has withstood their assaults before the court, and before the jury.

Whether correctly or not, we will not undertake to say, but one court has recently held that the parent can recover in behalf of the child for wrongs of this kind. The court will bear in mind however that the suit was not founded because of any requirement that the child should not be permitted to attend school, or be confined in the yard of the mother, but because of the latter threat, if the mother did not leave town with the child, the policeman would invade her home, and take the child to jail. Could a more grievous wrong be done anyone? In this land of liberty, where the humblest home is the castle of its inhabitants, though poverty abide there also, it is surprising when the facts of this case are considered, and it is remembered that the jury by their verdict forever settled the question in favor of the plaintiff, and accepted her theory and statement, that the verdict was for one thousand, six hundred dollars instead of a larger sum?

On page 6 of their brief beginning at the third paragraph, and from that point to the end, counsel devotes much time and labor trying to convince this court that this is an action against F. M. Meek, seeking to recover damages for an alleged threat on his part to arrest, and put Ledyard Harris, appellee's minor son in jail. But the mother is not seeking to recover for threats to the child. The fact is Meek as Mayor, ordered the plaintiff to leave Laurel with her minor son, and if she did not do so he would put the son in jail. Doesn't this order to leave Laurel mean pecuniary loss to appellee, and should she not have redress? Meek, according to Mrs. Harris, did not say to her, "Mrs. Harris your son, so rumor says, is a bad boy, and I think he would be better off on a farm,

or somewhere else, let me help you to arrange this." But he did not do this, he told her she must take her son and leave Laurel, and later, on another occasion, told her if she did not leave by Saturday, he would put her son in jail. The plaintiff testified this so frightened her she left Laurel at once. Doesn't this give her a right of action? The jury seems to have believed Mrs. Harris' statement, and disbelieved defendant's version. What greater wrong or injury could be done a poor, frail, delicate, little widow, with a minor son, and a frail, delicate mother sixty-five years old, all dependent upon this little widow's wages for support, they having no property except a modest little home, than to tell her she must leave her home and old mother, and take the son, and go out into the cold world an outcast, breaking up a happy family and leaving behind good friends. Had this been a man he would no doubt have told Meek to go to the hot place, but being a poor, frail, delicate woman, with no strong, manly arm upon which she could lean, these words and orders coming from the Mayor, the man in authority, struck terror to her heart, and she left Laurel. Appellants counsel contend in their brief that Meek was acting in his judicial capacity as Mayor. We, however, ask how on earth was Meek acting in his judicial capacity as Mayor; by what rights, or under what laws of the municipality, or under the constitution does he take upon himself the authority to order people to leave a certain place? This is a free country, and we are given the right of free speech, and freedom of individual action. We think the appellant in the latter part of his brief, from page six to the end, is trying to divert the court from the main issue, citing a lot of decisions having no bearing on the facts in this case. Meek was not holding any court, no warrant was made against her, then by what right or authority could he order her to leave the city of Laurel? We think counsel for appellant is right when he refers to Mayor Meek as an inferior tribunal, and we think the appellant must know that Meek while acting as Mayor of Laurel and wan-

dering around the streets, ordering people to leave town was in truth and in fact simply an "inferior tribunal." We think appellants classification very apt and appropriate, and we adopt it.

Section 1, article, 14 of the constitution of the United States says that "no state shall deprive a person within its jurisdiction the equal protection of the laws." In the face of this mandate we submit that for a Mayor to take upon himself the authority to order people whence they shall come and whither they shall go must think he has delegated authority above the state, and such authority as is possessed by some of the foreign, ancient or present rulers. Again, section 14 of the constitution of the state of Mississippi says "no person shall be deprived of life, liberty or property except by due process of law." For the Mayor of Laurel to order Mrs. Harris to leave Laurel is certainly depriving her of her liberty, in that he denies her the right to live in her own home, with her mother and son and make a living, he is depriving her of freedom of individual action.

HOLDEN J., delivered the opinion of the court.

Mrs. Lydia Harris, plaintiff in the court below and appellee here, sued for damages and obtained a judgment against F. M. Meek, defendant below and appellant here, for what seems to be an alleged threat of malicious prosecution of her son; and from this judgment, the defendant appeals to this court.

The appellee claimed in her declaration that in February, 1913, the appellant, F. M. Meek, while mayor commissioner and *ex officio* justice of the peace for the city of Laurel, willfully and maliciously ordered appellee to leave Laurel, and threatened to have her son, Ledyard Harris, arrested and put in jail if she did not take him away from Laurel. The appellee and her son, Ledyard Harris, sixteen years of age, were both joined as plaintiffs in the declaration; but upon the filing of a demurrer by defendant a nonsuit was taken by the plaintiff Ledyard Harris, leav-

ing it a suit by the appellee, Mrs. Lydia Harris, in her own right against the appellant for damages.

The plaintiff below testified, in substance, that F. M. Meek, the appellant, came to her and told her that he would have her son, Ledyard Harris, arrested and put in jail if she (Lydia Harris) did not take him away from Laurel. We copy the important part of appellee's testimony *verbatim* from the record:

"He said that he and all of his men were notified to arrest my boy the first time they caught him on the street, and put him in jail. We confined the boy strictly to my home premises for quite awhile. He finally told me after that time if I did not leave by Saturday he was coming to my home and arrest my boy and put him in jail. It scared me to think he would come to my home and arrest my boy and put him in jail, and I consented to leave with him. I was gone for three weeks."

The plaintiff's testimony was the only evidence introduced in her behalf. At this juncture in the trial the defendant moved to exclude the evidence of the plaintiff and to instruct the jury to return a verdict for the defendant, which motion was by the court overruled.

The appellant, F. M. Meek, was then introduced as a witness, and testified, in substance, that he was, at the time of the alleged conversation with the appellee, mayor commissioner of the city of Laurel, and that for some time previous there had been an unusually large number of incendiary fires in the city of Laurel, and that he, in conjunction with other citizens, had endeavored to discover the party causing the fires, and to that end had made up three hundred and forty-five dollars and employed a detective, one McKervery, to investigate the situation; that he was informed by the detective that Ledyard Harris, the son of the appellee, was the guilty party, and that upon receiving this information he sent for the appellee, with whom he was upon friendly terms, and when she arrived at the office, the detective, McKervery, told the appellee

that the evidence pointed strongly to her son as being the person who had caused the fires in Laurel, and that the detective said to her they wanted to put a stop to these fires and advised her, in a private and friendly way, that it would be best for her to take her son away from Laurel, as he was a young boy, and would do better with other associations and surroundings; that the appellee, then much distressed, asked the appellant what she should do about it, and he (appellant) advised and suggested to her in a kind and friendly way that it would be best for her to take the advice of the detective and take her boy away from Laurel, for awhile at least, and that that would probably cure the evil of the situation; that he advised and suggested to the appellee to take her boy away to some other field and away from his present surroundings, and that this would save her a good deal of trouble, because the grand jury would meet soon; that he gave her this advice in a friendly way in order to keep the boy out of trouble, and that he at no time threatened her nor the boy; that the appellee was a frequent visitor at the home of appellant, and often dined with his family, and that they were on friendly and cordial terms; that he had no malice or feeling against her, but, on the other hand, his feeling towards her was friendly and considerate; and that he had treated her as a neighbor and had no desire whatever to do a wrong to her or her boy, but was attempting to suggest or advise her in a way that was for her good and the good of her son. The son was subsequently indicted for arson. The appellee waited one year before filing suit. With this state of case before the court, the plaintiff was granted one instruction that the jury might find punitive damages for the plaintiff. No actual damages were claimed. The jury returned a verdict for the plaintiff in the sum of one thousand and six hundred dollars, as punitive damages.

We think the testimony shows conclusively that the appellant was acting in good faith, without malice, and with probable cause, and with no desire to oppress the ap-

Brief for appellants.

[110 Miss.]

pellee, but that his intentions were good. Therefore punitive damages cannot be recovered, if, indeed, any recovery whatever may be had. *Railroad v. Fite*, 67 Miss. 373, 7 So. 223; *Taft v. Taft*, 40 Vt. 229, 94 Am. Dec. 389; 12 Am. & Eng. Enc. 24, 25; 3 Black. Com. 120; *Grimes v. Gates*, 47 Vt. 594, 19 Am. Rep. 129. Under the facts in this case the verdict and judgment are erroneous.

Reversed and remanded.

FOUNTAIN ET AL. v. JOULLIAN.

[71 South. 2.]

TAXATION. Assessments. Charges.

Where lands are assessed to two joint owners, the tax collector cannot change the original assessment and apportion a separate half interest to each owner and having paid one-half of the assessment, sell the undivided interest of the other party upon his failure to pay one-half the tax and such a sale is void.

APPEAL from the chancery court of Hancock county.

HON. J. MORGAN STEVENS, Chancellor.

Bill by J. Q. Fountain against E. C. Joullian. From a decree for defendant sustaining a demurrer to the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

McDonald & Marshal, for appellants.

The second ground of the demurrer objects to the selling of an undivided interest in nine separate or distinct parcels of land which it is alleged should have been the subject-matter of separate assessments and same separately sold.

Section 3774, Code of 1892 applied. It did not require a separate assessment of each block. If it did so re-

quire, and was not followed, it did not vitiate the sale, as the section was merely directory and the owner was concluded by the assessment. Sections 3776 and 3787, Code 1892; *Mores v. Homes*, 48 So. 1025; *North v. Culpepper*, 53 So. 419.

The manner of sale was prescribed by section 3814, Code 1892, which directed land in cities, and towns and villages to be sold by lots or other subdivisions or descriptions by which it was assessed. It was assessed *in solido* and was properly sold in a lump.

The third ground of demurrer raises the question that an undivided interest in land cannot be sold for taxes and the tax collector's deed conveyed no title. We conceive this to be the vital point in the case.

The assessment was to Waite and Burns. Burns owed an undivided half interest which he acquired from Logan Walker by deed dated April 14, 1886, and Waite was the owner of an undivided half interest which he acquired from Logan Walker by deed dated July 22, 1889. They were not joint purchasers and did not hold through the same deed. Burns paid the taxes on the property embraced in the assessment which he owned, and it was a matter of no concern to him whether the taxes on Waite's half interest was paid or not.

Can the owner pay taxes on his undivided interest in realty? If he has this right, then an undivided interest in realty may be sold. If this right exists, it is not defeated on account of the assessment being *in solido*. The assessment need not be to the true owner, it might be assessed to unknown. The object of the state is to collect revenue on taxable property. *North v. Culpepper*, 97 Miss. 730 is in point.

Robinson v. Lewis, 68 Miss. 69, seems to be a case where an undivided half interest in land was sold at tax sale. Confirmation was refused because of incapacity of the complainant to purchase. Of course neither Burns, nor any tenant in common could purchase Waite's inter-

est. Appellants in this case were not disqualified to purchase. In *Stevenson v. Reed*, 90 Miss. 341, an undivided half interest in land was sold for taxes.

The learned chancellor was of the opinion that the law never intended to authorize a tax collector to permit a tenant in common to pay his *pro rata* share of the tax and force the state to sell the undivided interests of one or more other tenants and thus split up the title and reached the conclusion that nothing less than the entire estate of any particular tract can be sold by the tax collector. That if the state was compelled to buy an undivided interest at tax sale it would be forced to go into partnership with an individual and various questions and complications would arise.

The law at the time of this sale and now authorized the owner of land sold to the state to redeem it or any part of it or "any undivided interest in it." Sec. 3852, Code 1892; sec. 4330, Code 1906. An infant can redeem his undivided interest in land, and only his interest, when the interests of his tenants in common have become vested in the purchaser. Sec. 3823, Code 1892; Sec. 4338, Code 1906; *Wilson v. Sykes*, 67 Miss. 617.

It necessarily follows that the purchaser at tax sale whether an individual or the state, must in many instances become a tenant in common with others. The policy of the law is to get revenue on taxable property and to so get it, that each property owner may pay on what he actually owns whether it be the fee or an undivided interest.

A perusal of *Fox v. Lumber Company*, found in 80 Miss. page —, is enlightening. There is no halo around the form of paying the taxes, nor sanctity in the manner in which they are paid, but the principal thing to Mississippi is that she gets her stipend. She got it this case because Burns paid the half of it on the property which he owned, and she got the other on the half that Waite owned when he failed to pay it and it was sold and bought by appellants.

White & Ford, for appellee.

We respectfully submit that an assessment and sale of land for taxes to be valid must be an entirety. There is no law authorizing the tax collector to accept half, or any other proportionate part of the taxes assessed upon property, and then undertake to advertise and sell the remaining fractional interest as an undivided In order to accomplish this result, the tax collector in this case was compelled to make a new assessment and to advertise and sell the land upon the assessment thus made by him. The land as assessed shows they were assessed to Waits and Burns, but no proportion being assigned or assessed against the respective parties, so Burns assumed to pay half the taxes on an assessment which was an entirety.

We respectfully submit that there was no legal power in the tax collector to make a new assessment, assessing the other half interest to another person and thus undertaking to sell an undivided one-half interest, or equity, in these lands. It may be that if instead of undertaking to sell such half interest he had advertised the land as delinquent; that the partial payment would not have prevented the sale of the entire tract, but this was not done. The sheriff assumed to make a partition of this property, for the purpose of assessment and sale for taxes, and to sell the undivided interest in nine lots under an assessment which was wholly different from the one the assessor had made.

Our contention is that it is not within the legal power of the tax collector to sell an undivided interest in property for taxes and convey a legal title, unless he follows strictly an assessment made in that way against the parties. This exact proposition has never been decided so far as we are advised, but a somewhat similar one was before the supreme court, in the case of *Stevens v. Reed*, 90 Miss. 341. In that case, the tax collector undertook to sell an undivided interest in eighty acres of

land, without first having separated it into forty acre tracts, and his actions were held illegal, but whether it was because too much land was offered in one body, or whether it was because the attempt to sell the fractional interest in it, does not clearly appear.

With all respect to counsel for appellant we submit that the cases cited by them in their brief do not apply for the reason that such a procedure is not authorized by the statutes of this state. Under our elaborate system of taxation, if such a course were proper and if it had been the intention of the legislature to so provide, such a statute would have now been upon the statute book. It is true that in a few states such an assessment and sale can be made, but this is expressly authorized by statute. This goes to show that if it had been the intention of the legislature to so provide, legislation would have been enacted making this provision.

We call the court's special attention to the case of *Toothman v. Courtney*, 58 S. E. 915 (W. Va.).

The land itself is liable for the taxes, if the owners do not care to look out for their own interests, the state should not be made to go to the additional expense and trouble to collect the taxes when it can make the taxes by simply selling the land itself. Where there are several owners of one piece of land, the sheriff probably never knows what their real interests are. It can easily be seen what complications would arise from such a course.

Our theory is borne out in the 37th Volume of Cyc., pages 1340 and 1341. In the case of *Corbin v. Inslee*, 24 Kan. 154, it was held under a statute which required that in the assessment of land each particle of land must be separately listed and that the lists and assessments must contain a correct description of each parcel of real property and of quantity and value of each parcel, that an undivided interest in land could not be legally assessed.

Townsend Savings Bank v. Todd, 47 Conn. 190; *McDonough v. Elam*, 1 La. 489, 20 Am. Dec. 284. The reasoning of the learned chancellor, now Judge Stevens, in sustaining the demurrer in this cause, is so clear on this proposition that we take the liberty of citing in this place a portion of his opinion.

"There is no specific law in our state for assessing an undivided interest. The state in its sovereign power taxes the land itself, the fee. In the country it assesses by forty-acre subdivisions unless one owner owns more adjacent thereto, and then more than forty is assessed to the owner only where each forty is of equal value. In a city, town or village, lots are assessed just as forty-acre tracts in the country, but where more than one lot is owned by one party, then many may be lumped together where they are of same value. The proceeding is primarily against the real estate; the sale is of the fee. It is immaterial as to whom it is assessed; and our assessment to any claimant is not evidence that supports possession. The assessment in this particular instance was to two reputed owners, whose initials and the exact interest of whom are not shown. So far as the assessment showed, Burns might have owned fifteen-sixteenth; and the collector in accepting one-half the tax assumed to declare what he did not know, that Burns did own one-half; and furthermore he assumed to collect not the whole tax on any part of the whole, but did collect one-half tax on every lot and every grain of sand or moiety, and freed nothing of the estate absolutely. Such action ought to be and in my judgment is against public policy, and is certainly not expressly authorized by statute. If either Waite or Burns could pay on his part in this instance, then any reputed owner could do likewise where the land is assessed as unknown, and if there are sixteen tenants in common, one could pay one-sixteenth, and in case the state was compelled to buy the other interest at tax sale, then the state would be forced to go into partnership with an individual and

Brief for appellee.

[110 Miss.]

various questions and complications might and would arise. If one co-tenant cannot buy at the sale, he ought not, for like reason, be allowed to pay a portion of the tax and thus split up the title in undivided interests. There is no law for assessing in this state a life estate, an estate for years or any other estate that one may own in lands. The assessment is against the fee, and a sale of the land when held by a life tenant would defeat the title of the remainderman. *Harrison v. Harrison*, 56 Miss. 174. Neither can a reversioner buy in the tax title so as to defeat the title of his co-reversioners. *Fox v. Coon*, 64 Miss. 465, a case where the wife with dower interest for life permitted the land to sell and one of the heirs bought it from the state. One whose wife owns an undivided interest, cannot purchase at tax sale the interest of her co-tenant. 68 Miss. 69; 72 Miss. 156.

I mention these well known decisions merely to emphasize the policy of our law to require each co-tenant to protect the lands from tax liens and sales, and when he pays more than his share, he is given a lien on the interest of his fellows to reimburse him. One co-tenant is held in *Beaman v. Beaman*, 90 Miss. 762, disqualified to buy in and assert adversely a title at foreclosure of deed of trust that was a common charge, and, too, the wife of one of the co-tenants cannot do so. I appreciate of course that the present case does not present a case of one co-tenant purchasing the title; but the policy of the law and the universal practice of exposing for tax sale the entire fee and preventing one co-tenant from acquiring the whole estate through a tax sale is very persuasive to my mind that our lawmakers never intended to authorize a tax collector to permit a tenant in common to pay his *pro rata* of the tax and force the state to sell the undivided interests of one or more other tenants. If the title can be thus split up, and an undivided one-half sold, then an undivided one-hundredth

would have to be treated the same way, and thus on perhaps '*ad ridiculum.*' "

HOLDEN, J., delivered the opinion of the court.

The appellants filed their bill in the chancery court of Hancock county, seeking to confirm their tax title to an undivided one-half interest in certain real estate sold to them by the tax collector of Hancock county in March, 1896, for taxes of 1895. A demurrer, filed by the defendant below, appellee here, was sustained to the bill. It appears from the record that blocks sixty-one, sixty-two, sixty-three, sixty-four, sixty-five, sixty-six, sixty-seven, sixty-eight, and sixty-nine, Gulf View, section nineteen, township nine, range fifteen west, thirty-six acres, were assessed to "Waits and Burns" at a value of three hundred and sixty dollars, and that Waits and Burns owned this property jointly, each owning an undivided one-half interest therein. Burns went to the tax collector and paid the taxes on his undivided one-half interest in the land and received a receipt from the tax collector. No taxes being paid on the other undivided one-half interest of Waits, the tax collector advertised and sold Waits' undivided half interest in the property, when it was bought by Fountain and Farve, and upon this tax title the appellant relied in the court below. The appellee contended before the chancellor, with which contention the chancellor agreed, and urges here that the tax sale of Waits' undivided half interest in this property was void, and the appellee here being the owner of Waits' undivided half interest in the land has a good title to it. It appears from this record that the tax collector attempted to change the original assessment of this land and to apportion an undivided one-half interest in Wait and the other interest in Burns, and that upon the failure of the payment of the taxes due on Waits' undivided half interest he proceeded to sell this portion of the land "as an undivided one-half interest." The tax

collector did not endeavor to separate or apportion the land so that a distinct portion of it could be sold for the taxes, but he undertook to apportion an undivided one-half interest in the whole land not as originally assessed, and sell the undivided interest. An assessment of taxes against land is a proceeding primarily against the land and the sale is of the fee in the real estate. It is immaterial as to whom it is assessed. We have no statute authorizing a tax collector to change an assessment and apportion the different undivided interests to any number of parties who may claim such interests therein and sell such undivided interests, and we think to do this would be bad policy and illegal, and in all instances he should collect the tax on the land, and not on any individual, undivided, inseparable, interest therein. If it were permissible for the collector to change the assessment and collect separately the taxes upon as many different interests as he might apportion out, this would lead to confusion and complications not authorized by law, and against public policy. *Toothman v. Courtney*, 62 W. Va. 167, 58 S. E. 915; 37 Cyc. 1340, 1341; *Corbin v. Inslee*, 24 Kan. 154; *Sargent v. Sturm*, 23 Cal. 359, 83 Am. Dec. 118; *Macdonough v. Elam*, 1 La. 489, 20 Am. Dec. 284; *Savings Bank et al. v. Todd*, 47 Conn. 190.

In view of these conclusions we hold that the tax sale in this case was void, and the decree of the lower court is affirmed.

Affirmed.

FERMWOOD LUMBER CO. v. ROWLEY ET AL.

[71 South. 3.]

1. PUBLIC LANDS. *Lease. Sale of timber. Validity. Cutting logs. Power of board of supervisors. Trespass. Measure of damages.*

A conveyance of timber by a lessee of sixteenth section land, whose unexpired term continues for fifty-five years, is valid against one who with notice thereafter purchased the right to cut all the timber growing on the land from the board of supervisors.

2. PUBLIC LANDS. *Lease. Cutting logs. Powers of board of supervisors.*

In such case the only control which the board of supervisors had over the timber was to prevent its being cut or destroyed, except in accordance with the rules of good husbandry, unless the right so to do should be purchased from it, and this right it could sell only to or with the consent of the lessee of the land, or to or with the consent of the person to whom the lessee had sold the timber and his assigns.

3. SAME.

In such case the board of supervisors had no authority either to cut or remove the timber, or to authorize appellee so to do. The only right which it did have was simply the right to sell to appellant or its assignee, the right to cut and remove the timber for uses not within the rules of good husbandry.

4. TRESPASS. *Measure of damages. Wrongful cutting of timber.*

The measure of damages for the wrongful cutting of timber is the value of the timber cut and removed.

APPEAL from the chancery court of Marion county.

HON. R. E. SHEEHY, Chancellor.

Suit by Fermwood Lumber Company against William Rowley and others. From a judgment for defendants, plaintiff appeals.

The facts are fully stated in the opinion of the court.

Mounger & Ford, for appellant.

On the 17th day of August, 1914, we filed our original brief on behalf of the appellant and undertook to demonstrate by references to the authorities as the basis of

our contention, that a lessee of sixteenth-section land, though his right to the use of the timber is limited, may make a valid conveyance of that right which will transfer whatever rights he has to use the timber. On October 11, 1915, this court handed down its decision in the case of *Caston v. Pine Lumber Company*, deciding the exact point above referred to, in accordance with our contention. We now respectfully call the court's attention to this case as reported in No. 14, Vol. 69 of the South Reporter, beginning at page 668. We call especial attention to the following language used in the opinion:

"The lessee forfeited his right to the land when he failed to pay the taxes assessed against it, but the purchaser of the timber did pay the taxes separately assessed against the timber and thereby retained whatever timber right he had, and it was this right that came down to the appellee, small in itself, but, as a basis for a contract with the board of supervisors, to remove the timber, it may be of considerable value."

By referring to our original brief, or by referring to the record without regard to our original brief, it will readily appear that the court below decided the case at bar adversely to the appellant on the ground that the appellant had no right whatever in the timber by virtue of the deed conveying the same to it, and that such deed was utterly worthless, even as a basis for contract with the board of supervisors to remove the timber. In the *Caston case* above referred to, the value of a timber deed is recognized, and it is recognized as being of value specifically as the basis of a contract with the board of supervisors, to remove the timber, and it is said that for this purpose, it may be of considerable value. The court below deprived appellant of this benefit as well as of every other benefit which the appellant had by virtue of its deed, and we respectfully submit that a consideration of the *Caston case*, will show that it is decisive of our case, and entitles us to a reversal of the decision of the court below.

Dale & Rawls, for appellees.

Counsel for appellant, in their supplemental brief, contends that the holding of the court in the *Caston case* recently decided, reported in No. 14, Vol. 69 of Southern Reporter, beginning at page 668, is decisive of the case at bar, and entitles the appellant to a reversal of the decision of the court below. Counsel say:

“By referring to our original brief, or by referring to the record without regard to our original brief, it will readily appear that the court below decided the case at bar adversely to the appellant on the ground that the appellant had no right whatever in the timber by virtue of the deed conveying the same to it and that such deed was utterly worthless, even as a basis for a contract with the board of supervisors to remove the timber.”

We do not understand that the lower court in the case at bar held that appellant's deed was worthless to the extent that it would not be a basis for a contract with the board of supervisors to remove the timber.

The facts in the *Caston case* are very different indeed from the facts in the case at bar. In the *Caston case* appellee, who was claiming the timber, not only had whatever interest the lessee had in the timber, one of his predecessors in title having kept the same alive by paying the taxes on the timber separately assessed, but had also vested in himself the outstanding interests in the timber purchased of the board of supervisors, and as a matter of course, thereby became and was the owner of all of the merchantable pine timber. In the case at bar, appellant, the Fernwood Lumber Company, had only such rights in this timber as was conveyed to it by the lessees Cyrus Lewis, a right that is limited and peculiarly fixed, and to be determined in each instance by the circumstances surrounding it; a right which as was said in the *Caston case*, “as a basis of a contract with the board of supervisors to remove the timber it may be of considerable value. “But this right appellant, the Fernwood Lumber Company, did not avail itself of. Appellant had the right

to purchase this timber from the board of supervisors, but did not avail itself of the right, and appellee, as lessee of the land having also a right to purchase the timber and contract with the board of supervisors for the removal of same, did so, and as we contend, thereby acquired title to all of the merchantable timber on the lands.

We yet contend that there was no error in the holding of the lower court, and that the same should be affirmed.

SMITH, C. J., delivered the opinion of the court.

In March, 1900, Cyrus Lewis, being the lessee of the northeast quarter of the northeast quarter of a sixteenth section situated in Marion county, the unexpired term of his lease being about fifty-five years, sold and warranted to appellant the timber growing thereon by deed duly acknowledged and recorded. In October, 1910, Lewis, by deed, conveyed to appellee Rowley all his interest in the lease. In January, 1912, Rowley purchased from the board of supervisors of Marion county all of the timber growing on this land, and afterwards sold it to appellees Bourn and Williamson, who, over the protest of appellant, proceeded to cut and remove it, whereupon appellant filed its bill in the court below against them, and also against Rowley, praying that they be enjoined from cutting the timber, and that an account be taken of that cut and removed, and that he be awarded damages therefor. No injunction was issued, and the case proceeded to trial solely upon appellant's claim for damages. On final hearing, the bill was dismissed on the ground, as recited in the decree, that appellant had no interest in the timber.

As we understand this record, the only question presented to us for decision is: Did appellant have an interest in the timber; and, if so, what was the character thereof, and the measure of damages sustained by him because of its removal? The conveyance of the timber by Lewis to appellant was valid, and vested in appellant the right to appropriate it whenever it could be lawfully cut and re-

moved from the land. *Caston v. Lumber Co.*, 69 So. 668. And since appellee Rowley had notice of this conveyance when he purchased the land, he obtained by this purchase no title or right to the timber.

The only control which the board of supervisors had over the timber was to prevent its being cut or destroyed, except in accordance with the rules of good husbandry, unless the right so to do should be purchased from it, and this right it could sell only to, or with the consent of, the lessee of the land (*Dantzler Lumber Co. v. State*, 97 Miss. 355, 53 So. 1), or to or with the consent of the person to whom the lessee had sold the timber, and his assignees. In the case at bar the only person to whom this right could have been lawfully sold was appellant, so that Rowley and his assignees, Bourn and Williamson, acquired no right to appropriate the timber by virtue of Rowley's contract with the board. The board of supervisors had no authority either to cut and remove the timber, or to authorize appellees so to do. The only right which it did have in this connection, and consequently the only right which Rowley and his assignees acquired by virtue of Rowley's contract with the board; was simply the right to sell to appellant, or its assignees, the right to cut and remove the timber for uses not within the rules of good husbandry.

The interest of appellant in the timber being as herein before outlined, and appellees having neither title thereto nor right of possession thereof, the case, as to the measure of damages, falls within the rules laid down in 38 Cyc. 2089, par 4. From which it necessarily follows that the measure of appellant's damages is the value of the timber cut and removed.

Reversed and remanded.

HEWES ET AL v. HEWES ET AL.

[71 South. 4.]

1. WILLS. *Validity. Holographic. Wills. Incorporation.*

Under Code 1906, section 5078, so providing, a will to be valid, must be wholly written and subscribed by the testator, or attested by two witnesses in his presence. A letter directing the disposition the testatrix wished made of her property after her death, in the event she should not make another and more formal will, wholly written and subscribed by the testator, was properly admitted to probate as a part of her last will and testament.

2. WILLS. *Incorporation of extrinsic documents into will.*

Where an extrinsic document is incorporated into a will by a reference thereto in the will, it becomes a part and parcel thereof; and since a will not attested by witnesses must be "wholly written" by the testator himself, it necessarily follows that for an extrinsic document to be incorporated into and thereby becomes a part and parcel of a will valid only if "wholly written" by the testator himself, such document must also be so written; for should it not be, the whole will would not be in the handwriting of the testator.

APPEAL from the chancery court of Harrison county.

HON. J. MORGAN STEVENS, Chancellor.

Petition by Newton L. Hewes and others for probate of the will of Fannie G. Henderson deceased. From a decree in favor of the proponents allowing the probate, contestants appeal.

The facts are fully stated in the opinion of the court.

T. A. Wood, W. G. Evans and J. L. Traylor, for appellant.

It was never contended in this case, nor is it now contended that a will properly attested may not adopt another paper by proper reference, and make it a part of a will where the will so adopted, is not holographic.

Where a will is wholly written and signed by the testator and attested by witnesses, it may be proved either by any witness who is familiar with the handwriting of the testator, or it may be proven by the attesting witnesses. And a will wholly in the handwriting and signed by the testator, attested by witnesses and the proof of the execution of the will by said witnesses, changes the holographic form.

The efficacy of the will does not depend on the handwriting or form of the will, when so proven. A will not being wholly written or any part of same written by the testator, but signed by him without testamentary witnesses, cannot be probated. *Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555; *Baker v. Brown*, 83 Miss. 793; *Buffington v. Thomas*, 84 Miss. 157.

It does not depend on the intention of the testator, nor of the disposition made in his will of his property. A paper produced for probate may be clear in intent and adequate in expression to convey property, still if it fails to conform to the statute in such cases made, then the instrument fails as a testamentary paper. If it fails to comply with the statutes in such cases prescribed, it cannot be admitted to probate. *Estate of Rand, supra*.

There seems to be some uncertainty and confusion on the part of appellees as to what they shall name this letter addressed to "Idie;" whether it is a codicil, or whether it is the main will, and by reference as engrafted into it, the first will of Mrs. Henderson, together with the will of Mrs. Smith, or whether the will of Mrs. Henderson and Mrs. Smith being joint and mutual was by one fell stroke engrafted into the letter to "Idie" by a reference thereto. But by whatever reference or process the will of Mrs. Smith may be incorporated into the letter to "Idie" and become a part thereof, it not being in the handwriting of Mrs. Henderson, would destroy as a testamentary instrument both Mrs. Smith's will and the letter to "Idie." *Estate of Rand*, 61 Cal. 468, 44 Am. Rep. 555.

It is not contended by appellants that the letter addressed to "Idie," if testamentary in character, might not have by proper reference become a codicil to the first will of Mrs. Henderson. A testamentary paper, holographic in form, may become a codicil to a testamentary paper previously executed with attesting witnesses, whether holographic in form or not. But the letter to "Idie" is not claimed to be a codicil to Mrs. Smith's will.

The letter addressed to "Idie" was delivered when written to Miss Sophie Tibblier, as testified to by her, and was intended as hereinbefore stated as evidence of a discharge of an obligation of Mrs. Henderson to Miss Tibblier, with the request that "Idie" see that her wishes in the matter were carried out. Mrs. Henderson was apprehensive as stated in that letter and said "It may not stand in law," but she wrote the letter to protect Sophie. *Fitzgerald v. English*, 73 Minn. 266, 76, N. W. 27.

The expression in the letter "The home place is for you four girls," should be read in the light of all the circumstances; taking into consideration the fact that she then expressed her intention in the letter, later I will make a will. That the will she made, later, would give the home place to the four girls. *Estate of Meade*, 118 Cal. 428, 62 A. S. R. 244.

The lower court found as a matter of fact that Mrs. Smith's will, by a reference in the letter addressed to "Idie," was made a part of the letter and thereby became a part of Mrs. Henderson's last will and testament. The court apparently must have had doubt of the soundness of this finding, because he announced as a reason for so finding, and it was decreed, that Mrs. Smith's will was a part of the last will and testament of Mrs. Henderson, and admitted to probate for the purpose of aiding in the construction thereof. It was pointedly stipulated at the beginning of the trial, that the construction of the will sought in the petition was abandoned, and the issue was only for the record and probate of the will. The will could not be construed at this time and in this

proceeding. *Koplin v. Coleman*, 60 So. 885; *Partt v. Hargreaves*, 76 Miss. 955; *Lily v. Tobbein* (Mo.), 23 A. S. R. 887; *Woodruff v. Hunly* (Ala.), 85 A. S. R. 145.

If Mrs. Smith's will is to be considered as a part of Mrs. Henderson's will, it necessarily must speak through the letter addressed to "Idie" and become a part of said letter, but Mrs. Smith's will being in the handwriting of and signed by Mrs. Smith, could not by reference and adoption transform Mrs. Smith's handwriting into the handwriting of Mrs. Henderson; the prescribed statutory rule requiring holographic wills to be wholly written and signed by the testator would not be complied with.

The term "form," when used with reference to holographic wills, does not refer to the manner of expressing the testator's disposition of the property, but the proof of a holographic will not attested must be by proof by witnesses and exemplification of the paper, and the court may adjudge, without reference to the testimony of witnesses, whether the instrument is wholly in the handwriting of the person who signed it. 44 Am. Rep. 555.

This is well expressed in the opinion of Judge Whitfield in the case of *Baker v. Brown*, 83 Miss. 793.

So we find no authority, under any state of the case, for incorporating Mrs. Smith's will or in any way making it a part and parcel of Mrs. Henderson's last will and testament; and neither does counsel for appellees cite any authorities therefor at all, but we have cited abundant authorities showing that it cannot be any part of Mrs. Henderson's will.

Neither is the letter referred to as Exhibit "C" any part of Mrs. Henderson's will, as it does not come within the rules of a testamentary paper, as shown herein.

White & Ford, for appellee.

The first contention of appellants is that the letter addressed to "Idie" is insufficient for the reason that it shows no testamentary purpose; and appellants cite the cases of *Yount v. Wark*, 76 Miss. 829, *Du Sauzay v. Du*

Sauzay, 63 So. 273, and some other cases decided by some other states in support of this contention.

In *Young v. Wark*, *supra*, after the death of the decedent, a folded paper was found behind a vase upon the mantelpiece with the following words written on it: "Want Sarah relatives have all property." This paper was signed by the decedent, but was not dated. There was nothing about the paper to indicate that it was intended to operate as a will; and the court in that case held that without some evidence of the intention upon the part of the decedent to dispose of his property by this instrument to take effect at his death, that the court could not assume that the paper was intended to be testamentary in its character.

In the case of *Du Sauzey v. Du Sauzey*, *supra*, Mrs. Du Sauzey, whose husband was still living, but who had made a will giving her all his property, executed an instrument beginning as follows: "If the will made by my husband in my favor becomes null at my death, I wish the pharmacy remain after the death of their father to Joseph Alfred De Montluzin. Du Sauzey and his brother Jean Rene Gabriel De Montluzin Du Sauzey, our sons and associates," etc. The court in that case held that this did not appear to be testamentary instrument to take effect at her death, but was a mere suggestion of the disposition of that she desired her husband to make of her property in case he should survive her.

The case of the *Estate of Meade*, 62 Am. St. Rep. 244, and *Ferris v. Neville*, and the note thereto, in 89 Am. St. Rep. 498, simply held that it is the *animus testandi* that makes an instrument a will, and that unless it appears clearly from the face of the instrument that it was testamentary in character; that the court will not presume that it was so intended.

The other contention of appellants that in order for an instrument to be incorporated into a will as part of it, that the instrument itself must be in the handwriting of the testator is not supported by any authority that we have

ever found, and certainly it is not supported by any authority cited by appellants' counsel.

In *Baker v. Brown*, 83 Miss. 793, it was held that a holographic will, complete and perfect in itself, is not invalidated by the fact that the caption, consisting of the words "my will" was not in the handwriting of the testator. This is the sole question that was decided in that case, the court holding that it was immaterial whether or not the words "my will" were in the handwriting of the testator; that while the statute requires holographic wills to be entirely written by the testator, that the words "my will" were not dispositive in character and may be treated as surplusage, and it was immaterial whether these words were in the handwriting of the testator or not. *Skerrett*, 67 Cal. 585, 8 Pac. 181.

The recent case of the *Estate of Plummel*, 151 Cal. 77, 121 A. S. R. 100, cited by appellants on this point, not only fails to bear out the contention of appellants, but holds exactly the reverse. In this case the will was written on one side of a sheet of paper and was wholly written and signed by the testator except the figures "190" in the date 1904, these figures being printed and not written. There was a codicil written on the other side of the paper and the codicil was wholly written and signed by the testator. The court in that case held that the will itself was not a valid will for the reason that it was not wholly written and signed by the testator, and was not attested by witnesses. In other words that by reason of the fact that the figures "190" were printed that it was not a valid holographic will under the statute; but the court further held that, by the codicil which was regularly executed, this will was incorporated in the codicil and both the original and the codicil were admitted to probate, the court in that case saying: "It has long been settled that the will and codicil executed in accordance with the requirements of the statute may by appropriate reference incorporate in itself a document or paper not so executed." Citing 30 Am. & Eng. Enc. of Law (2 Ed.).

588; *Habergham v. Vincent*, 2 Ves. Jr. 204, 228; *Smart v. Prujean*, 6 Ves. Jr. 560; *Allen v. Maddock*, 11 Moore P. C. 427; *Brown v. Clark*, 77 N. Y. 369.

SMITH, C. J., delivered the opinion of the court.

This is an appeal from a decree of the court below admitting to probate three instruments as the will of Mrs. Fannie G. Henderson, deceased. On the 30th day of April, A. D. 1911, Mrs. Henderson executed a will, the only item of which reads as follows:

“Whatever property I may die seized and possessed of real or mixed wherever situate I will, and devise & bequeath to Julia R. Smith to take & enjoy the usufruct thereof for & during her natural life time, for the sole support & maintenance of herself & her sister Helen L. Sheffield both of the city of Norfolk, state of Virginia.”

On the same day, Julia R. Smith executed a will by which she bequeathed and devised all the property that she might inherit from Mrs. Fannie G. Henderson, to Newton H., Frederick S., William H., Francis G., George P., Henry L., and Finley B. Hewes. After the death of Mrs. Henderson there was found with her will a sealed envelope (addressed to “Miss M. S. Hewes—for Sophie to give Idie in case of my death [Signed] F. G. H.”) containing the following letter:

“Pass Christian July 1st 1913

“My dear Idie: I am writing to you today fearing something might happen to me before I can get a deed properly drawn up, and signed, and I feel confident that you will carry out my wishes.

“I desire that Sophie Tibblier shall at my death, be given the house, I have just built, and the furniture. The silver you can divide as you think best, also the house linen, and any pictures you wish. My clothes are not worth much and can be given to Lizzie. Also a hundred dollars when the estate is settled. The home place is for you four girls that is you, Lillie, Cora & Emma.

"I give the house to Sophie for two reasons, first, I tore down her house, and second because of the loving attention she gave to my dear husband and myself. There is a will of mine leaving to Julia Smith all unsold lands and one from her, leaving them to your brothers.

"I do not suppose this would stand in the courts, but there is no need of going to law. Later I will make a will. I only want to secure Sophie in case of my sudden death.

"Always Your loving Aunt

"FANNIE G. HENDERSON."

These three instruments were propounded in the court below for, and upon final hearing were admitted to, probate, the decree reciting that:

"After due consideration of all of the evidence in this case, and after hearing full legal arguments, the chancellor finds from the evidence:

"First. That the two writings designated as Exhibits A and C to the petition of proponents constitute the true and last will and testament of Fannie G. Henderson, deceased, and should be admitted to probate as such.

"Secondly. That the writing designated Exhibit B to said petition of proponents, and referred to as the 'will of Julia R. Smith,' was by adoption and implication made a part and is now a part of the true last will and testament of Mrs. Fannie G. Henderson, deceased, and should be admitted to probate as explanatory of said will of Mrs. Henderson and in aid of the construction thereof—to which findings of the court the contestants excepted."

The two questions presented to us for decision are: Should the court below have admitted to probate, first, the letter from Mrs. Henderson to Idie? and, second, the will of Mrs. Julia R. Smith as having been 'by adoption and implication made a part' of the will of Mrs. Henderson? The answer to the first of these questions must be in the affirmative, and to the second in the negative.

The letter directs what disposition the writer wished to be made of certain property after her death in event she

should die without making another and more formal will, and is therefore testamentary in character; and, conceding for the sake of the argument that the reference in the letter to the will of Mrs. Julia R. Smith indicates an intention to incorporate it therein as a part thereof, the attempt so to do must fail under the provisions of section 5078, Mississippi Code 1906, for the reason that it was not written by Mrs. Henderson herself.

When an extrinsic document is incorporated into a will by a reference thereto in the will, it becomes a part and parcel thereof; and since a will not attested by witnesses must be "wholly written" by the testator himself, it necessarily follows that for an extrinsic document to be incorporated into and thereby become a part and parcel of a will valid only if "wholly written" by the testator himself, such document must also be so written; for should it not be, the whole will would not be in the handwriting of the testator. *Gibson v. Gibson*, 28 Grat. (69 Va.) 44.

Reversed and remanded.

SEAY v. LAUREL PLUMBING & METAL CO.

[71 South. 9.]

STATUTES. *Amendment. Reference to title. Constitutionality.*

Laws 1912, chapter 232, entitled "An act to amend and enlarge section 3074, Code 1906, and to extend and enlarge the provisions of same, so as to provide more effective liens for subcontractors, laborers and others employed," section 1 being headed "Liens of Laborers and Subcontractors Extended"—Code amended utterly fails to comply with section 61 of the constitution of the state, which reads: "No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived shall be inserted at length." This act is unconstitutional because it fails to insert at length, in chapter 232, section 3074 of the Code of 1906, as amended.

APPEAL from the circuit court of Jones county.

HON. J. M. ARNOLD, Judge.

Suit by the Laurel Plumbing & Metal Company against T. H. Seay an another. From a judgment for plaintiff, defendant Seay, appeals.

The facts are fully stated in the opinion of the court.

Flowers, Brown, Chambers & Cooper, for appellant.

Chapter 232 of the Laws of 1912, under which this suit was brought, seeks to amend section 3074 of the Code of 1906; this act reads as follows: Section 1—Be it enacted by the legislature of the state of Mississippi that every journeyman, laborer, sub-contractor or other person employed by such contractor, master workmen, mechanic or other person to work on the building, fixtures, machinery or other improvements, or to furnish material for the same, shall have this lien for his work or material. If within thirty days after the building is completed or the contract of such laborer or sub-contractor or workmen shall expire, or he be discharged, he or they shall notify, in writing, the owner of the property on which the building or improvements is being made or his agent or attorney, if he reside out of the country, that said lien is claimed, and said lien shall continue for the space of ninety days from the date of said notice in favor of such mechanic, sub-contractor or laborer, provided, however, that the owner of the building shall not be liable for a greater amount than the amount contracted for with the contractor, and be enforced as provided in said section 3074 of said code.

This act is indefinite and uncertain. It seeks to amend a section of the code by reference thereto only and does not set out the amended section at length. It refers to a lien but does not state its nature, nor does it say to what it shall attach. For the mode or manner of its enforcement reference is made to section 3074 of the code. Section 61 of the constitution provides:

“No law shall be revived or amended by reference to its title only, but the section or sections so amended or revived shall be inserted at length.”

Chapter 232 of the Acts of 1912, is an attempt to amend section 3074 of the code. It does not provide a different remedy but seeks to change the scope or effect of the remedy given by section 3074. The change sought by this act, or that is, the change reflected by it as it now stands, is vicious and far reaching in its effect. Section 3074 of the code is a sane and reasonable law. It provides a lien and a method for its enforcement which is in accord with ordinary business principles. Chapter 232 of the Acts of 1912, which seeks to amend this section is at war with common business methods and dealings. Section 3074 provides, in effect, that when any sub-contractor, etc., has furnished material or labor used in the erection of a house or building, such sub-contractor may give notice in writing to the owner of such house of the amount due, and thereupon the amount that may be due by such owner to the contractor under whom the sub-contractor worked or furnished materials, shall be bound in the hands of such owner for payment of the sum claimed. It then provides an adequate method for the enforcement of such lien. Chapter 232 of the Acts of 1912 seeks to change this statute so as to establish a lien on the property itself for a period of thirty days from the date of completion, regardless of whether the contractor may or may not have been paid in full. Under this act a party for whom a building may be constructed settles with the contractor within thirty days of the completion of such building at his peril. No contractor can be paid within thirty days of the completion of a building unless the party making the payment takes upon himself the risk of being called upon to pay the bills of sub-contractors, etc., who may have performed services or furnished material to such contractor. By this act section 3074 of the code is repealed fully and completely.

"The general rule is that when any statute is revised, or when one statute is framed from another, some parts being omitted, the parts omitted are considered as annulled. Where a statute is evidently intended to revise the whole subject treated in a former statute and though there may be a plain '*casus omissus*' the courts cannot supply it." *Clay County v. Chickasaw County*, 1 So. 753; *Mobile & Ohio Railroad Company v. Weiner*, 49 Miss. 725.

Section 307 being repealed and no longer the law, reference to it for the method of enforcement of the remedy conferred by the Act of 1912 is ineffectual. That part of section 3074 which refers to the enforcement of the lien has been omitted from the Act of 1912; it is no longer the law and so far as the provision in the act to the effect that the same "shall be enforced as is provided in said section 3074 of said code" is concerned, reference might just as well have been made to some clause in the Koran. All of section 3074 save that portion set forth in the Act of 1912 is repealed by such act. However, the act shows upon its face that it was not the intention of the legislature that it should repeal section 3074; this is true because it expressly refers to section 3074 for the means of its enforcement. This, we respectfully submit cannot be done. It violates the spirit as well as the letter of section 61 of the constitution. Nothing could be more confusing than to have laws amended in this manner. There would be no means of knowing when one had the existing law. A statute might be changed or modified or annulled in some manner by a mere reference in a subsequent statute or Act. This would open the flood gates to misinterpretation and misunderstanding. Chapter 232 of the Acts of 1912 is invalid because of the fact that it violates section 61 of the constitution. The legislature did not intend to enact a law which would have the effect of repealing the materialman's lien statute, yet they did, in effect, do so. We make this statement as to the legislative intent because it is plain from the wording of the act that the

law-makers fully intended section 3074 to be kept alive by expressly referring to it for the method of enforcing the remedy conferred by the act. Two statutes, however, cannot any more occupy the same field at the same time than two bodies occupy the same space at the same time. One or the other must fail, and in the case at bar, it is chapter 232 of the Acts of 1912, which must fail because it contravenes section 61 of the constitution.

If chapter 232 of the Acts of 1912, should be held invalid, section 3074 of the code will remain in full force and effect. It will in effect remove a cloud from the statute in question and put it in good standing once more.

"Where a statute which undertakes to amend an existing statute is invalid, the existing statute remains in full force. 36 Cyc. 1056 citing numerous authorities."

And in the well reasoned opinion of the New York Court of Appeals in *People of New York ex rel. v. Menschling*, 187 N. Y. 8, 79 N. E. 884, the following language is used: "Can a valid statute be annulled by a void amendment? A section in a later act amending a section in an earlier act, 'so as to read as follows,' if followed by a blank space only, would effect no change in the law. That is the legal effect of the situation now before us. The section of 1906 is void, at least in the respect mentioned, and a void thing is no thing. It changes nothing and does nothing; it has no power to coerce or release; it has no effect whatever. It neither repealed or substituted, for as it was void it could do neither," citing *Norton v. Shelby County*, 118 U. S. 425.

Therefore we submit that since section 3074 of the code will in no way be affected by the decision, other than to be cleared of the doubt and uncertainty which now surrounds it, and further that as this appellant has suffered imposition of an unjust judgment by virtue of this act, it should be declared invalid.

Halsell & Welch, for appellee.

Counsel would have this court hold the Act of 1912 Chapter 232, unconstitutional. In no other way can they hope to have this case reversed.

We think they misunderstand the purpose of the statute. It was not intended to repeal section 3074, Code 1906. This is plainly shown by reference in the act to section 3074 as to the manner of enforcing the act. Section 3074 seems to be a very much misunderstood provision of our law. It was never intended to do more than it plainly sets forth.

All efforts to extend this section of the code by judicial interpretations have failed, and it now stands as originally written. It was never designed as an aid to sub-contractors or laborers except as to moneys due by the owner to the original contractor.

Since the opinion of this court in the case of *A. & S. Spengler v. Stiles Tull Lumber Company* on suggestion of error, there has been no further effort to extend section 3074 of the code by judicial interpretation, but the legislature enacted as a law, chapter 232, Laws of 1913, and this law gives sub-contractors and laborers additional rights without repealing section 3074.

The case of *A. & S. Spengler v. Stiles Tull Lumber Company*, is reported in 48 So. 966. In a very able opinion every phase of section 3074 is discussed. No doubt this case discussing the New York system or plan, and the Pennsylvania system resulted in the enactment of chapter 232, Laws 1912. To fully understand the scope and intention of this act we ask the careful reading of the *Spengler* case. See also 27th Cyc. 101.

As we said above, the criticism aimed at the Act of 1912 seems to have arisen from a belief that the act was intended to repeal section 3074. But we think this is just an additional remedy given to sub-contractors and laborers, just as this court said in *Mayor and Board of Aldermen of City of Jackson v. State ex rel. Howie District*

Attorney, 59 So. 873, that the Act of 1912, chapter 120, enlarged and gave a new scheme for commission form of government in addition to that provided by section 3299 *et seq.*

The same point was made in attacking the constitutionality of the act under section 61 of the constitution. We think the case is directly in point and decisive of the question at bar. See also *Mayor etc. v. State ex rel. Collins, Attorney-General*, 60 So. 873.

But even if the Act of 1912 is unconstitutional we are under the testimony entitled to judgment on the third count of the declaration, and the case should be affirmed.

SYKES, J., delivered the opinion of the court.

The Laurel Plumbing & Metal Company, a corporation, brought this suit in the circuit court of the second district of Jones county, against Dr. T. H. Seay and E. R. Russell, claiming a balance due of four hundred and seventy-five dollars and three cents, upon the following statement of facts, viz.: The appellant, Dr. Seay, let a contract to E. R. Russell for the building of a residence in the city of Laurel. The contractor, E. R. Russell, sublet to the appellee the plumbing and heating of the residence. Dr. Seay settled in full with the contractor, Russell, but the contractor failed to settle with the appellee, whereupon the appellee brought this suit, claiming a lien under chapter 232, Laws 1912, and obtained judgment for the amount sued for.

It is the contention of the appellant that this act is unconstitutional; and that is the only question to be decided by this court. The title to chapter 232, Laws 1912, is:

"An act to amend and enlarge section 3074, Code of 1906 and to extend and enlarge the provisions of same, so as to provide more effective liens for subcontractors, laborers and others employed."

Section 1 of said act is headed:

"Liens of Laborers and Subcontractors Extended—Code Amended."

As the title to the above act states, it is clearly intended by this act to amend and enlarge section 3074 of the Code of 1906. This act cannot be understood without a reference to the above section of the Code. It speaks of certain designated persons having a lien, but does not state upon what this lien attaches. It utterly fails to comply with section 61 of the Constitution of the State of Mississippi, which reads as follows:

"No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length."

The act in question is unconstitutional, because it fails to insert at length, in chapter 232, section 3074 of the Code of 1906, as amended.

Reversed and remanded.

JAYNE v. NASH LUMBER Co.

[71 South. 10.]

TRESPASS. *Action for damages. Sufficiency of complaint.*

A declaration alleging that pursuant to a contract between plaintiff and defendant a lumber company, the defendant in 1911 cut timber amounting to fifty-three thousand feet and in 1912, to the amount of ten thousand feet and owed a balance thereon of thirty-eight dollars and sixty-two cents; that plaintiff notified defendant that he would expect rent for a mill site after 1911, for the first eight months of 1912 at ten dollars a month and after that at twenty dollars a month; that after notice the defendant kept trespassing on plaintiff's land, and asking damages for a willful trespass, with an itemized statement of indebtedness annexed thereto and asking judgment on the amount thereof, stated a good cause of action.

APPEAL from the circuit court of Rankin county.

HON. C. L. DOBBS, Judge.

Suit by R. K. Jayne against the Nash Lumber Company. Demurrer sustained to plaintiff's declaration and he appeals.

This is an appeal from a judgment of the circuit court sustaining a demurrer to plaintiff's declaration, which is as follows:

Comes R. K. Jayne, plaintiff, and sues Nash Lumber Company, a corporation or partnership, which has been operating a mill on the lands of said Jayne, in Rankin county, state of Mississippi, and for cause of action says:

That in pursuance of a contract made and entered into by and between Nash Lumber Company (through its agent W. B. Nash) and said Jayne on the fourteenth (14) day of February, 1911, the said Nash Lumber Company did in the year 1911 cut timber to the amount of fifty-three thousand, two hundred and one feet and in the year 1912 did cut timber to the amount of ten thousand, and forty-four feet, besides a small amount of oak timber, and that he still owes a balance on said timber of thirty-eight dollars and sixty-two cents the last money paid by him being June 8, 1911.

Jayne further states that in October, 1911, he wrote Nash insisting that he finish cutting his timber and not stray off onto other places, and notified said Nash that as he had had plenty of time to cut his timber, he should expect pay for the use of the mill site. Jayne has a copy of the letter to this effect. A little later, however, in a personal interview, Nash urged that he was doing the best he could and Jayne agreed not to charge for the use of the mill site for the balance of said year 1911, but notified Nash that he would expect rent after that. Still later, in the latter part of December, Nash approached Jayne and stated that he had bought the timber on the school eighty and would like to keep his mill there good part of the following year and would be willing to pay a reasonable rent. The rate of rent was never fixed. On July 31, 1912, Jayne wrote W. B. Nash, agent for said Nash Lumber Company, stating that he should expect rent for the mill for the first eight months (through August 31st) at ten dollars a month, and that after that date the rent would be twenty dollars a month. In the same letter he notified Nash that he must not cut any more timber off of his (Jayne's) land. But contrary to this notice Nash did cut five trees, for which he has made no accounting.

Jayne regards this a willful trespass and asks for statutory damage.

Furthermore Jayne states that he was the owner of the timber on the Country Club land, he having bought it of the county at the same time he bought that on his own place, that the Country Club afterward confirmed and ratified this purchase and that Nash and the Nash Lumber Company, not only had no right to cut any of this timber, but that they were especially shown the line between the two tracts and guarded against getting on the said club land, and for over a year they did strictly regard this line, but finally they did deliberately, as it appears, invade the said Country Club land and cut therefrom one hundred and fifty-one (151) trees. That Jayne asks for this willful trespass full statutory damage of \$15 a tree.

That Jayne claims, therefore, that Nash Lumber Company is indebted to him:

| | |
|---|------------|
| Balance on timber during 1911 and 1912 | \$ 38.62 |
| Rent of mill site January 1 to August 31, inclusive | 80.00 |
| Rent of mill site September 1 to November 1, 1912 | 40.00 |
| The willful cutting and removing of five (5) trees | 75.00 |
| The willful cutting and removing of 151 trees.. | 2,265.00 |
| Total | \$2,498.62 |

Now, therefore, the plaintiff, R. K. Jayne, sues the said Nash Lumber Company for the sum of two thousand, four hundred and ninety-eight dollars and sixty-two cents and prays that judgment be given him.

Stingley & McIntyre, for appellants.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the circuit court of Rankin county. The declaration of plaintiff in the court below states a good cause of action, and the court erred in sustaining the demurrer thereto.

Reversed and remanded.

LEWIS v. HARRISON ET AL.

[71 South. 5.]

EXEMPTION. *Wages of laborer.*

Where a board of supervisors contracted with one of the defendants to work certain portions of the public roads at a stipulated sum per mile and afterwards such defendant subcontracted with the other defendant for one-half of the proceeds of such contract, and the board issued a county warrant to the original contractor for the amount agreed upon, and while such warrant was in the warrant book in the chancery clerk's office of the county, it was levied upon under an execution issued upon a judgment against both defendants. In such case the warrant was not exempt from execution as the wages of a laborer, or person working for wages under Code 1906, section 2139, par. 10a.

APPEAL from the circuit court of Neshoba county.

HON. C. L. DOBBS, Judge.

Suit by W. M. Lewis against B. H. Harrison and another. From a judgment for defendant, plaintiff appeals.

This case was tried by agreement before the circuit judge, a jury being waived, upon an agreed statement of facts, hereinafter set out, and resulted in a judgment for the defendants below, from which plaintiff appeals.

"Agreed Statement of Facts.

"It is agreed by counsel for plaintiff and defendants that the facts in this case are as follows:

"B. H. Harrison and R. A. Weathers are both resident citizens of Neshoba county, Miss., and are both heads of families.

"That R. A. Weathers entered into a contract with the board of supervisors of Neshoba county, Miss., to work certain portions of the public road of said county, as shown by the minutes of said board, shown on pages 12 and 18 of Minute Book 6, a copy of which is to be taken as part of this agreement.

"That the contract was for a stipulated amount per mile. That the said R. A. Weathers afterwards, as contractor, subcontracted with B. H. Harrison for one-half the proceeds of said contract, as shown by said minutes, to do part of the work.

"Afterwards and in pursuance of said contract the said board of supervisors made an allowance to said B. H. Harrison for ninety-nine dollars and fifty cents for work on said road.

"That after said allowance a warrant was issued to B. H. Harrison, which was in full payment of the aforesaid allowance to him, which warrant was for ninety-nine dollars and fifty cents. That said warrant was levied on by the sheriff of Neshoba county, Miss., under an execution issued on a judgment rendered in favor of W. M. Lewis against both B. H. Harrison and R. A. Weathers; said warrant being in the warrant book in the chancery clerk's office in Neshoba county, Miss., when the sheriff levied on it. That the work done on the road was done by B. H. Harrison and R. A. Weathers, for which said allowance was made, in the month of December, 1912, and which said work for which said warrant was issued required the labor of the said parties for the month; and, further, the said Harrison and others had been working said road off and on for two years, drawing warrants on the same."

J. C. Ward and W. M. Lewis, for appellant.

The board of supervisors hold no power to direct or control either Weathers or Harrison in doing the work. They were not, in doing their work, subject to the direction or control of the board of supervisors or any one else. All they had to do was to do the work according to plans and specifications of the board. They could exercise their own discretion as to how and when they would work; what days they would work and at what time of the day they would begin work or stop work or how many hours per day they would work. They were under the directions of no superior. They were their own masters.

"The right to claim wages or other property as exempt is to be construed as having reference to such persons only as perform manual or menial services, and such as are responsible for no independent action, but do a day's work or stated job under the directions of a superior." 12 Am. & Eng. Enc. of L. (2Ed.) page 100.

In the case of *Heard v. Crum*, 73 Miss. 157, the court say, quoting from *Lang v. Simmons*, 64 Wis. 529: "We think it very clear that . . . laborers . . . who can be said to earn wages of any employer must hold such relation to the employer that he can direct and control them in and about the work which they are doing for him." The court quotes with approval from an English case as follows: "The term 'wages' is to be understood in its popular sense, and does not include wages which are the price of a contract." In this case appellees contract was to work the public roads at a stipulated price. They were contractors and the sum agreed to be paid was the price of their contract.

Again we have in this case Weathers sub-contracting with Harrison. Can it be said that a man can sub-contract wages? The question as to whether a person is a contractor or a person working for wages is not to be determined alone from the fact that he did actually perform all the work himself but from the contract actually made. The contractual relations determine and not the facts as to who actually did the work. If he is a contractor, or enters into a contract to do certain work for a stipulated sum for the work and is not under the direction and control of the party with whom he made the contract in doing the work, it is immaterial as to whether he does the work himself or employs others to help him. He then becomes an independent contractor and is not entitled to the exemptions under our statute. In the case of *Heard v. Crum*, *supra*, there was a contract to build a house for a certain price and Heard did part of the work himself and claimed exemption under the statute, but the court held that he was an independent contractor and denied him the exemption.

If the question be raised that the warrant, when levied on, was in the custody of the board of supervisors, the answer is that the board of supervisors has not made any objection and the debtor cannot do so. *Dollar v. Allen-West Com. Co.*, 78 Miss. 274.

We respectfully submit that the court erred in finding for appellee and the judgment should be reversed.

Wells, May & Saunders, for appellees.

The case of *Wade v. Gray*, 104 Miss. 151, which is made the subject of additional brief for appellant, according to our interpretation has no sort of application to the issues involved in this case. The court did hold that Mr. Wade was an independent contractor so far as was involved the question of who would be liable for torts committed by him. No question of exemption or interpretation of our exemption law was involved in that case.

In the instant case we have sought to make clear our contention that the determining factor in an exemption claim to money due for labor performed, is whether the money that is due and claimed as exempt represents the fruits of the personal toil and labor of the exemptionist or whether it represents profits or money due for the labor of others, or for materials and money invested in the contract. If the former, it is exempt; if the latter, it is not.

It is admitted in this case that the money claimed as exempt is due to the appellees for personal labor expended by them, whether it was done for a contract job, or for work by the day, is not material. It was labor performed within a month and within the amount fixed by law.

We submit again the judgment of the trial court was manifestly correct and ought to be affirmed.

SMITH, C. J., delivered the opinion of the court.

This case is ruled by the case of *Heard v. Crum*, 73 Miss. 157, 18 So. 934, 55 Am. St. Rep. 520.

Reversed, and judgment here for appellant.

Reversed.

**J. J. WHITE LUMBER COMPANY v. McCOMB CITY
TURPENTINE COMPANY.**

[71 South. 5.]

1. **LANDLORD AND TENANT. Turpentine leases. Actions. Evidence. Deficiency in leased lands. Recovery. Burden of proof. Timber leases. Construction.**

When the lessee of timber lands claimed that there was a deficiency of acreage under his contract, it had the burden of showing the amount of the shortage.

2. **LANDLORD AND TENANT. Timber lease. Construction.**

Where defendant leased to complainant lands for the purpose of turpentineing, which were described as containing approximately six thousand, nine hundred and thirteen acres of timber and the contract of lease recited that the lessee might box for turpentine purposes all merchantable pine timber, and that the term "merchantable pine timber" should mean any tree of sufficient size to square not less than four inches. In such case in view of other provisions for turpentine a fixed number of acres each year and for the location by the lessor of the lands to be turpentineed yearly, the lessor was not bound to furnish virgin timber of the acreage specified.

3. **LANDLORD AND TENANT. Timber leases. Construction. Deficiency.**

Under the facts in this case, the contract of lease was a contract in gross or in bulk, so that no recovery for shortage in the acreage of the timber could be maintained where the shortage did not amount to deception or fraud.

APPEAL from the chancery court of Pike county.

HON. R. B. MAYES, Special Chancellor.

Bill by the McComb City Turpentine Company against J. J. White Lumber Company. From a decree for complainant, defendant appeals.

The facts are fully stated in the opinion of the court.

J. S. Sexton and W. B. Mixon, for appellant.

Price & Price and Jr. Talley, for appellee.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of Pike county, Hon. Robert B. Mayes, special chancellor. The appellee, McComb City Turpentine Company, complainant in the court below, filed its bill, claiming, among other things, that the appellant, J. J. White Lumber Company, defendant below, leased to appellee, through Carr Bros., for turpentine purposes, six thousand, nine hundred and thirteen acres of merchantable pine timber, suitable for turpentine purposes, for which it paid appellant twenty-five thousand, fifteen dollars and eighty cents, and that appellant failed to deliver the quantity, six thousand, nine hundred and thirteen acres of pine timber as contracted; that the shortage in the delivery amounted to one thousand, four hundred and eleven acres, which was a breach of the contract—and seeking to recover the purchase price and damages of appellant therefor. The lumber company, defendant below, answered, and, among other things, contended that appellee could not recover for the alleged shortage of one thousand, four hundred and eleven acres, for two reasons: First, that as a matter of fact, under the contract of lease, there is no shortage of one thousand, four hundred and eleven acres, or any amount whatever, and if there be any shortage at all, it is inconsiderable; second, that the contract of lease is a contract “in bulk” or “in gross,” and that the shortage or variation, if any, is allowable to the lessor, under the contract here involved. There was a decree in favor of appellee as to the shortage of one thousand four hundred and eleven acres, and for other damages claimed in the bill, and appellant prosecutes this appeal. We here set out the material parts of the contract involved:

This contract and agreement made and entered into in duplicate this the 27 day of October, A. D. 1905, by and between the J. J. White Lumber Company, a corporation existing under the laws of the state of Mississippi,

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herein called the party of the first part, and Carr Bros., composed of the individuals J. A. Carr and A. S. Carr, partners of Hattiesburg, Miss., hereinafter called the parties of the second part. Witnesseth: The party of the first part for and in consideration of the rent hereinafter reserved to be paid and the covenants to be performed by the parties of the second part, does by these presents hereby demise, farm, let and lease unto the said parties of the second part, their heirs or assigns all of the pine timber suitable for turpentine purposes located on the lands hereinafter described, which lands are owned by the party of the first part, and all of the merchantable pine timber suitable for turpentine purposes on the lands hereinafter described, upon which the party of the first part owns on them merchantable pine timber to wit:

| | Sec. | Acres. |
|--|------|--------|
| S $\frac{1}{2}$ of S $\frac{1}{2}$ | 22 | 120 |
| S $\frac{1}{2}$ of S $\frac{1}{2}$ | 23 | 150 |
| W $\frac{1}{2}$ of NE $\frac{1}{4}$, SW $\frac{1}{4}$, W $\frac{1}{2}$ of SE $\frac{1}{4}$, and SE $\frac{1}{4}$ of SE $\frac{1}{4}$ | 25 | 340 |
| All on section | 26 | 480 |
| All on section | 27 | 520 |
| S $\frac{1}{2}$ of NE $\frac{1}{4}$ | 28 | 400 |
| S $\frac{1}{2}$ | 28 | |
| E $\frac{1}{2}$ of SE $\frac{1}{4}$ | 29 | 80 |
| SE $\frac{1}{4}$ | 31 | 50 |
| S $\frac{1}{2}$ | 32 | 200 |
| All on | 33 | 630 |
| N $\frac{1}{2}$ and N $\frac{1}{2}$ of SE $\frac{1}{4}$ | 34 | 360 |
| N $\frac{1}{2}$ of NW $\frac{1}{4}$ of SW $\frac{1}{4}$ | 34 | |
| N $\frac{1}{2}$ and N $\frac{1}{2}$ of S $\frac{1}{2}$ | 35 | 560 |
| SW $\frac{1}{4}$ of SW $\frac{1}{4}$ and S $\frac{1}{2}$ of SE $\frac{1}{4}$ | 35 | |
| W $\frac{1}{2}$ of N $\frac{1}{2}$ and S $\frac{1}{2}$ of NW $\frac{1}{4}$ | 36 | 360 |
| SW $\frac{1}{4}$ of NE $\frac{1}{4}$ and N $\frac{1}{2}$ of SE $\frac{1}{4}$ | 36 | |
| All in Township One (1) North of Range Six (6) East, Amite county, Miss. | | |

110 Miss.]

Opinion of the court.

| | | |
|--|-----|-----|
| NE $\frac{1}{4}$ and NW $\frac{1}{4}$ of NW $\frac{1}{4}$ | 31} | |
| S $\frac{1}{2}$ of NW $\frac{1}{4}$, E $\frac{1}{2}$ of SW $\frac{1}{4}$, and W $\frac{1}{2}$ of SE $\frac{1}{4}$ | 31} | 440 |
| Township One (1) North of Range 7 East, Pike County, Mississippi. | | |
| N $\frac{1}{2}$ of NW $\frac{1}{4}$ and SW $\frac{1}{4}$ of NW $\frac{1}{4}$ | 1 | 120 |
| NE $\frac{1}{4}$ of NW $\frac{1}{4}$, E $\frac{1}{2}$ of NW $\frac{1}{4}$ of NW $\frac{1}{4}$ | 12 | 50 |
| Township One (1) South, Range Six (6) East, Tangipahoa Parish Louisiana. | | |
| S $\frac{1}{2}$ of NE $\frac{1}{4}$, E $\frac{1}{2}$ of NW $\frac{1}{4}$, and E $\frac{1}{2}$ of W $\frac{1}{2}$ of NE $\frac{1}{4}$ | 2} | 400 |
| SW $\frac{1}{4}$, NW $\frac{1}{4}$ of SE $\frac{1}{4}$ | 2} | |
| E $\frac{1}{2}$ of SW $\frac{1}{4}$ of SE $\frac{1}{4}$ | 3 | 16 |
| SE $\frac{1}{4}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of SE $\frac{1}{4}$ | 9 | 40 |
| NE $\frac{1}{4}$, S $\frac{1}{2}$ of NW $\frac{1}{4}$, and NW $\frac{1}{4}$ of SW $\frac{1}{4}$ | 10 | 220 |
| SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and NW $\frac{1}{4}$ of SW $\frac{1}{4}$ | 11 | 40 |
| W $\frac{1}{2}$ of N $\frac{1}{4}$ | 4 | 50 |
| N $\frac{1}{2}$ of NE $\frac{1}{4}$ and S $\frac{1}{2}$ of SE $\frac{1}{4}$ | 5 | 60 |
| All in section | 37 | 437 |
| W $\frac{1}{2}$ of NW $\frac{1}{4}$ | 6 | 40 |
| NW $\frac{1}{4}$ of NW $\frac{1}{4}$, N $\frac{1}{2}$ of SW $\frac{1}{4}$ of NW $\frac{1}{4}$ and SE $\frac{1}{4}$ of NE $\frac{1}{4}$, and fraction of SE $\frac{1}{4}$ | 7 | 165 |
| N $\frac{1}{2}$ of NW $\frac{1}{4}$, SW $\frac{1}{4}$ of NW $\frac{1}{4}$, and fraction of SW $\frac{1}{4}$ | 8 | 122 |
| Ninety acres on the N $\frac{1}{2}$, N and W sides | 38 | 90 |
| Township One (1) South, Range Six (6) East, St. Helena Parish, Louisiana. | | |
| Lots 1, 2 and 3 | 1 | 70 |
| And fractional NE corner of the George Gordon section 55 to make 90 acres with lot 1 of | 1 | 90 |
| Fraction E $\frac{1}{2}$ of NW $\frac{1}{4}$ of NE $\frac{1}{4}$ and NE $\frac{1}{4}$ of NE $\frac{1}{4}$ | 12 | 40 |
| Fractional SE corner | 56 | 20 |
| Fractional east side section 37 | | 143 |

Township, One(1) South of Range Five
(5), St. Helena Parish, Louisiana.

—being in all approximately six thousand, nine hundred and thirteen acres of timbered land.

It is understood and agreed by this contract,

First. That the term merchantable pine timber shall mean any pine tree of sufficient size to square not less than four inches (4") by four inches (4").

Second. That the parties of the second part hereby pay unto the party of the first part the sum of five thousand dollars (\$5,000.) to bind this contract, receipt whereof is hereby acknowledged, the balance or deferred payments to twenty thousand, fifteen & ⁸⁰/₁₀₀ (\$20,015.80), making the total amount to be paid for the lease of the aforesaid lands for turpentine purposes at the rate of three dollars and sixty cents per acre, to be paid by the parties of the second part to the party of the first part on or before the first day of December, A. D. 1905.

Third. For the above consideration the party of the first part conveys and warrants to the parties of the second part their heirs or assigns the right to enter upon said lands, to box, work and use for turpentine purposes the aforesaid pine timber for the purpose of producing and manufacturing resin and spirits of turpentine for the full end and term of three (3) years from the date of entry thereon as hereinafter provided or until the third crop of turpentine is gathered from the said pine timber.

Fourth. It is agreed and understood that the party of the second part shall not commence operation upon said land before the first day of January 1907, and may box for turpentine purposes not more than fifteen hundred acres (1500) of said timber each year or turpentine season during the life of this contract, except that should the parties hereafter agree to use more or less of said timber each year, the same shall be agreed to in writing. Provided, however, that on January the first, 1910, that the said party of the first part shall have the right to proceed

to take the timber from not exceeding one thousand, five hundred acres of said lands during the year 1910 and not to exceed one thousand, five hundred acres during each year thereafter; during the life of this contract.

Fifth. The party of the first part shall on or before the first day of November in each year, locate and designate the land upon which the pine timber shall be turpented for the first time during the next twelve months and furnish to the parties of the second part, abstracts of the title to said lands and maps showing the location of said land.

Sixth. It is the purpose of this contract to allow the parties of the second part to take the turpentine from the pine timber on said lands for three (3) consecutive years, in such locations as will be convenient for the party of the first part to cut and manufacture the pine timber so turpented at its saw mill plant at McComb City, Mississippi, as soon after the termination of the turpentine period of three (3) years as is practicable.

Seventh. The party of the first part agrees to allow the parties of the second part and hereby conveys to them the right to erect, construct and locate stores, storehouses, turpentine distilleries and other buildings necessary to be used in gathering, storing or manufacturing the turpentine and resin products gathered from said lands on the lands owned by the party of the first part, and to remove or sell for purpose of removal of said buildings or other fixtures at or before the termination of this contract, and the party of the first part further grants unto the parties of the second part to cut wood, building and barrel timber from its said lands necessary to be used in the manufacture and barreling the turpentine or resin products that are gathered from the aforesaid land, and the rights granted in this section shall be free from cost to the parties of the second part.

* * *

Twelfth. The parties of the second part, their heirs or assigns shall have the right to assign or transfer this

lease, to lease or sublet the whole or any part of said timber for the whole or any part of said term to any reasonable person, firm or corporation, or to place any agent, employee or representative upon said land in the operation of such turpentine business without the knowledge or consent of the party of the first part.

Thirteenth. In consideration of the foregoing covenants and promises and the consideration paid and to be paid, the party of the first part hereby warrants and defends and will during the term of this contract and lease, warrant and defend the parties of the second part in the possession of the above-described land and premises.

In witness whereof, the parties to this contract and lease have hereunto set their hands and seals in duplicate this 24th day of October, A. D. 1905.

J. J. WHITE LUMBER COMPANY.

By J. J. WHITE, Pres. [Seal].

J. A. CARR, for CARR BROS.

Attest: H. L. WHITE, Sec.

The record in this case is voluminous, and we have given it a careful examination and patient consideration. We find it necessary, in order to properly construe the contract here, to take into consideration the circumstances and surroundings of the parties at the time the lease was agreed upon. The appellee wanted to lease the pine timber for turpentine purposes. The appellant lumber company had about eight thousand, three hundred acres of land lying scattered in two counties in this state and two parishes in Louisiana, upon which stood merchantable pine trees suitable for turpentine purposes. Mr. Carr, appellee, testified that just prior to entering into the contract:

"They represented to me that they had something like about eight thousand acres of land there in Amite and Pike counties, and in St. Helena and St. Tammany parishes, which contained something like six thousand, nine hundred acres of timber."

Appellee, Carr, drove out through the timber, inspecting it west of Osyka, in company with a timber man and engineer (Burke); and he and Burke afterwards examined the timber on the east side; that at this time appellant stated to appellee that they, appellant, had on the land "six thousand nine hundred and thirteen acres there or thereabouts, of timber;" that appellee understood "approximately" to mean "near about;" that "'virgin timber' is a natural forest where the timber has never been removed." The testimony introduced by appellant as to the situation and conditions immediately preceding the making of the contract tends to show in substance, that appellant intended to lease to appellee only the timber which might be on the eight thousand, three hundred acres of land, and that the six thousand, nine hundred and thirteen acres of timber was an estimate of the amount of acres of timber on the whole body of land, and, also, that the appellee's surveyor, Clark, in making his survey of the alleged shortage, wrongfully excluded from the survey certain timber included in the terms of the lease. The chancellor may have, in weighing the testimony, given only slight credence to appellant's proof. As to this, we do not question his discretion to do so; but the testimony of appellee may be considered by us as true in construing the contract of lease. With these surroundings and circumstances, the contract was entered into, and appellee boxed the trees for turpentine purposes for several years, until the storm of September, 1909, when all the timber was destroyed. Afterwards, this lawsuit followed.

The lower court arrived at the shortage of one thousand, four hundred and eleven acres of timber by the survey made by Clark and Ball, employed by appellee. Clark testified as to the survey, and said that he had not surveyed the timber, but surveyed the old fields and swamps, and arrived at the amount of shortage in this way; and that he surveyed and included "only virgin timber," leaving out of his survey all other timber regardless of size, or

whether or not it was merchantable pine timber suitable for turpentine purposes; and that he also left out certain timber land claimed by outside parties, the title to which is admitted in this record to be in the appellant. The whole testimony shows that there were "old field pines" and other pines that would square "more than four inches by four inches," and a large amount of timber that was not counted in the survey because it was not "virgin timber," but which was in fact merchantable pine timber, suitable for turpentine purposes. Clark further testified that he left out all 4x4 inches, square timber, unless it was "virgin timber," and that if his survey had taken in the timber in the old fields and swamps, appellee "would probably had as much as the lease called for;" that there were suitable pines in the swamps and old fields, but this was not "virgin timber." We cannot say from the whole proof in the record that the timber left out by appellee's surveyors, without authority of the contract, would not amount to one thousand, four hundred and eleven acres of merchantable pine timber suitable for turpentine purposes; and we think it would be more reasonable to conclude that the appellee's surveyor, Clark, was right when he said that, if the merchantable pine timber suitable for turpentine purposes in the old fields and swamps and on the lands claimed by outside parties, the cut-over lands, and timber squaring 4x4 inches, not "virgin timber," had been included in his survey, that appellee would have gotten all the lease called for. Now, let us look at the contract signed by all the parties to this controversy. It cannot be said to be a contract of warranty as to the quantity, but merely warrants the use and possession of the appromixed quantity covered by the lease. It is to be construed against both parties alike. We think an examination of the contract will disclose the clear intent of the parties that the timber on the eight thousand, three hundred acres of land was leased for twenty-five thousand fifteen dollars and eighty cents, and while the instrument

attempts to apportion or specify the number of acres of timber in each subdivision of land, yet this appears to be a mere estimate, and is qualified by the clause in the contract, "being in all approximately six thousand, nine hundred and thirteen acres of timbered land." "At the rate of three dollars and sixty cents per acre" is only a calculation based on the estimate of the number of timbered acres, which, when figured out, does not harmonize with the total amount of the purchase price. Appellee, Carr, testified that three dollars and sixty cents per acre was merely a basis for the lease. The appellee knew that no survey of the timbered land had been previously made by appellant, and that all parties were depending on an estimate of the timbered acreage made by Engineer Burke, as to the amount of timber on the eight thousand, three hundred acres of land.

After an exhaustive study of the contract and evidence, and the authorities bearing on the questions involved, we are firmly convinced that the able chancellor erred in his finding against appellant for the one thousand, four hundred and eleven acres under the terms of the contract in this case. There is no escape from the conclusion that the contract includes all merchantable pine timber suitable for turpentine purposes, regardless of whether it be virgin timber, cutover timber, old field timber, swamp timber, or 4x4 timber, on the eight thousand, three hundred acres of land. The surveyors Clark and Ball, for appellee, testified that they left out of their survey all of the merchantable pine timber suitable for turpentine purposes, except the "virgin timber." This was wrong. The contract does not specify "virgin timber." This being true, there was no way for the chancellor to determine, from the evidence before him, how much timber was left out by appellee's surveyors in their survey; and, being unable to say how much of the six thousand, nine hundred and thirteen acres is short, if any at all, and the burden of proof being on the complainant below to prove its case, the chancellor certainly could not rightfully decree

that there were one thousand, four hundred and eleven acres short, or that there was any shortage whatever, or if any number of acres were short, that it was such a shortage or variation as to show fraud or deception, for which the lessee may recover the purchase money from the lessor. Taking all the testimony together, and considering the contract in connection therewith, we hold that appellee, under the terms of the lease, failed to establish the shortage of one thousand, four hundred and eleven acres of timber, as he excluded in his survey certain merchantable pine timber, suitable for turpentine purposes, which is included within the terms of the lease, and this excluded timber may have amounted to one thousand, four hundred and eleven acres, or it may have amounted to enough to make the variation, if any, inconsiderable; consequently, no recovery can be had. And this is true even though the contract here be construed as a contract "in acres" and not a contract in "gross," as urged by learned counsel for appellee. *Frederick v. Youngblood*, 19 Ala. 680, 54 Am. Dec. 210; *Dale v. Smith*, 1 Del. Ch. 1, 12 Am. Dec. 64; *Estes v. Odom*, 91 Ga. 600, 18 S. E. 355; *King v. Brown*, 54 Ind. 368; *Young v. Craig*, 2 Bibb (Ky.) 270; *Rogers v. Garnett*, 4 T. B. Mon. (Ky.) 269; *Clark v. Scammon*, 62 Me. 47; *Hurt v. Stull*, 3 Md. Ch. 24; *Hall v. Mayhew*, 15 Md. 551; *Slothower v. Gordon*, 23 Md. 1; *Phipps v. Tarpley*, 24 Miss. 597; *Mann v. Pearson*, 2 Johns. (N. Y.) 39; *Ketchum v. Stout*, 20 Ohio, 453; *Pendleton v. Stewart*, 5 Call (Va.) 1, 2 Am Dec. 583; *Caldwell v. Craig*, 21 Grat. (Vt.) 132.

We hold, also, from the whole record in this case that the contract of lease is a contract "in gross," or "in bulk," and that no recovery can be maintained for the shortage or variation here, if any, it not amounting to deception or fraud, in the quantity of timbered land. Am. & Eng. Ency. Law, vol. 20, p. 875; *Phipps v. Tarpley*, *supra*; *Kerr v. Kuykendall*, 44 Miss. 137; *Tyson v. Hardesty*, 29 Md. 305; *Hurt v. Stull*, *supra*; *Oaks v. De Lancey*, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628; *Pen-*

dleton v. Stewart, supra; Melick v. Dayton, 34 N. J. Eq. 245; *Wadlington v. Hill*, 10 Smedes & M. (Miss.) 560; *Atkinson v. Sinnott*, 67 Miss. 502, 7 So. 289; *Waddell v. De Jet*, 76 Miss. 104, 23 So. 437; *Eps. v. Saunders*, 109 Va. 99, 63 S. E. 428, 132 Am. St. Rep. 904; *Hodges et al. v. Denny*, 86 Ala. 226, 5 So. 492; 39 Cyc. 1314; *Phifer v. Steenburg et al*, 66 Fla. 555, 64 So. 265.

In view of these conclusions, the case is reversed as to that part of the decree for the one thousand, four hundred and eleven acres of timber, and the claim dismissed, and in all other respects is affirmed. Let all the court costs be assessed equally against appellee and appellant.

Reversed and affirmed in part.

HORTON v. KING ET AL.

[71 South. 9.]

TAXATION. Assessment. Validity of statute.

Laws 1908, chapter 239, which empowers the board of supervisors of Lincoln county to order an assessment of lands for the year 1908; said assessment to be made in all respects as required by law for regular land assessments and to be in lieu of the last regular assessment, does not violate section 112 of the state constitution, providing that "taxation shall be uniform and equal throughout the state. Property shall be assessed for taxes under general laws, and by uniform rules, according to its value."

APPEAL from the chancery court of Lincoln county.

HON. G. G. LYELL, Chancellor.

Suit by Dr. W. H. Horton against George King and others. From a decree for defendants, plaintiff appeals.

On March 16, 1912, appellant filed his bill in chancery for the confirmation of a tax title to certain land in Lincoln county described in the bill, alleging that said land was sold on the first Monday in April, 1909, for the taxes for the year 1908. Appellees answered, alleging that the land was assessed and sold under the provisions of chapter 239 of the Laws of 1908, which appellees alleged to be unconstitutional, as violative of section 112 of the Constitution of the state of Mississippi, which provides that:

“Taxation shall be uniform and equal throughout the state. . . . Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value.”

The law of 1908 referred to is an act empowering the board of supervisors of Lincoln county to order an assessment of lands thereon for the year 1908; said assessment to be made in all respects as required by law for regular land assessments. The act provides that the board may within its discretion order this assessment at the regular April meeting 1908, and that it shall be in lieu of the last regular assessment of lands in said county, and be approved by the board at the time and in the manner prescribed by law for general land assessments and shall constitute the land assessment of said county till the next regular land assessment.

The board ordered the assessment authorized by this act, and taxes were not paid on the land in question, which was bought by appellant at the tax sale. The validity of the act of 1908 is the only question for decision.

H. H. Creekmore, for appellant.

HOLDEN, J., delivered the opinion of the court.

The assessment of the property was made by the county assessor under chapter 239, Acts of 1908. We hold that the assessment and tax sale were valid.

Reversed and remanded.

MCLEOD v. CLARK.

[71 South. 11.]

1. **VENDOR AND PURCHASER.** *Bona fide purchaser. Notice of parol reservation. Fixtures. What constitutes. Statute of frauds.*

Where the owner sold a lot a portion of which was occupied by a store house extending a distance of nine feet over the lot with a parol reservation of the right to remove the house, a subsequent purchaser of the lot without notice of the reservation could maintain an action for trespass against the original owner for removing the house over his protest.

2. **FIXTURES.** *What constitutes.*

A store house standing on pillars, of brick and wood is a fixture and goes with the land on the sale thereof and the vendor has no right to remove the same as against an innocent purchaser from his vendee.

3. **STATUTE OF FRAUDS.** *Parol reservation of interest in land.*

On the sale of land a parol reservation by the vendor of the right to remove a fixture thereon, was void under the statute of frauds, as to an innocent purchaser from the vendee thereof.

APPEAL from the circuit court of Forest county.

HON. P. B. JOHNSON, Judge.

Suit by Louis B. Clark against John A. McLeod. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Stevens, Stevens & Cook, for appellant.

Tally & Mayson, for appellee.

SYKES, J., delivered the opinion of the court.

The appellant, John A. McLeod, was the owner of a lot in the business portion of the town of Hattiesburg. This lot fronted fifty feet on Pine street and was one hundred and fifty feet deep; on which lot was situated a one-story frame storehouse building about thirty feet wide and one

hundred feet long. This storehouse stood on pillars; some being brick, and some brick and wood. Appellant sold twenty front feet of this lot to one William Moffett, Jr., on April 3, 1907. Nine feet of the storehouse building was located on the part of the lot sold to Moffett. A number of the brick pillars and brick and wooden pillars were also on Moffett's land. There was also a side door opening on the Moffett side of the lot. The appellant gave Moffett a warranty deed to said twenty feet, but attempted to reserve, orally, title to the storehouse above mentioned. Shortly thereafter, Moffett sold the land to one M. D. King, giving King notice of the oral reservation of title to the house in McLeod. On May 7, 1907, for a cash consideration of three thousand, six hundred dollars, King sold the said lot by warranty deed to Louis B. Clark, the appellee in this case. Clark was not informed of the oral agreement reserving to McLeod the title to the house. The testimony in the case shows that, at the time of purchase by Clark of the lot, the storehouse was rented by the appellant to a tenant who was paying the rent to the appellant. The appellee Clark, however, did not know to whom the rents were being paid at the time of his purchase, neither did he know of the claim of McLeod to the entire house. Shortly after purchasing the lot, the appellee took the question of rents of the house up with the appellant, requesting that he pay him his part of the rent. This appellant declined to do, and told Clark that he claimed title to the entire house under the oral reservation above set forth. The appellee then, through his agent, notified Mr. McLeod in writing that he claimed his portion of the rents, and also that the appellant must not move or interfere with the house. Appellant subsequently removed the house from the land of the appellee, and appellee filed this suit in trespass for conversion and damages against appellant; which trial resulted in a verdict and judgment for the appellee for about three hundred and twenty-five dollars from which appellant prosecutes this appeal.

Before the sale of the twenty feet of the lot by McLeod to Moffett, he (McLeod) had placed the said storehouse, or rather about nine feet of it, upon the lot sold to Moffett. When this was done, this fixture immediately became a part of the realty; consequently, any agreement or oral reservation of title as to the storehouse is absolutely null and void because contrary to the statute of frauds. It is an attempt, in effect, to convert real property into personal property by an oral agreement. After once becoming a part of the realty, the fixtures must always be dealt with as real property. This is quite different from an agreement made between parties that fixtures may be erected upon the land but are to remain personal property, because when the agreement is made the property is personal property and because of the agreement it never becomes real property. It needs no citation of authorities on our part to the effect that a house when built becomes a part of the real property; and, when it once becomes a part of the realty, any oral agreement as to its title is absolutely void.

“It is generally held in America that a parol sale of fixtures, part of the realty, by the owner of the fixture, is within the statute and void, and that to be valid it must be with the formalities prescribed for the sale of real estate. If by deed land is sold on which there is a fixture part thereof, a parol exception of the fixture is invalid. To be effective the exception must be according to the form requisite for the exception of other real estate.” 19 Cyc. 1072.

Affirmed.

MRS. K. EDWARDS & SONS v. FARVE.

[71 South. 12.]

1. STATUTE OF FRAUDS. *Agreements not to be performed within one year.*

Under the provisions of the statute of frauds, providing that contracts not to be performed within one year from the making thereof must be in writing, the possibility of the death of the promisor within one year would not take the contract out of the statute unless the death leaves the contract fully performed, the rule being, if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not.

2. STATUTE OF FRAUDS. *Agreements not to be performed within one year.*

In a suit on a contract for the delivery of ninety thousand logs at the rate of two hundred per day, an instruction that a suit cannot be maintained on an oral contract which was not to be performed within one year and if the jury believed that the logs could not be handled within one year at the rate of two hundred a day they shall find for the defendant, should not have been refused, as the contract was within the statute of frauds since the clause "not to be performed within one year from the making thereof" means to include any agreement which, by fair and reasonable interpretation of the term used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making.

APPEAL from the circuit court of Hancock county.

HON. J. J. BALLINGER, Judge.

Suit by Cameron Farve against Mrs. K. Edwards & Sons. From a verdict for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Bowers & Griffith and E. J. Gex, for appellants.

We deny that it is the rule in Mississippi or anywhere else that parties by their contract must expressly provide

that it should extend for more than twelve months to bring it within the statute of frauds because, if the court please, such a construction of the statute would reduce the matter to an absurdity. Let us assume, if your honor please, for the sake of argument, that A owned one hundred lots of land and agreed with B that B should build him one house each month, no more and no less, upon the land; it would be apparent from the very terms of the contract that it was expected to last more than twelve months, and such is the contract that was made in this case. The fact that appellee might have died within twelve months does not change this rule at all, because the contract was made on the assumption that the whole of the land was to be logged and the damages sued for are for the failure to permit him to log the whole of the land. Certainly the court cannot find from this record that there was any possibility of the contract being completed within twelve months, or that the parties contracted with a view to its completion within twelve months, and unless the court can so find the case must be reversed.

We take it that there is no doubt that the case will be reversed, because the court failed to submit the question of the statute of frauds to the jury, refusing all instructions whatever drawn along that line, but we insist that when it is reversed it should be dismissed, because of the fact that the evidence of Mitchell shows that there had been hauled at the time of the trial, which occurred sometime after the breach of the contract at least sixty-seven thousand logs, and that there were approximately thirty odd thousand left on the land. This evidence was perfectly competent and was uncontradicted by any competent proof, which went to show that that many logs had not been hauled from this land, and the appellee availed himself of the evidence of the same book in his cross-examination of Mitchell which is set out in the original brief filed by appellant in this case, to which the attention of the court is respectfully invited.

In the conclusion of their brief appellee stated in concluding their argument on statute of fraud "that of all this," referring to the statute of frauds was submitted to and fully argued before the jury who disregarded the flimsy disguise which is now attempted to be put over this court."

And replying thereto, we call the court's attention to the fact that the question of the statute of frauds was never submitted to the jury but the court refused any instructions whatever on that subject, and the statute of frauds "was not argued before the jury, because, of course, no argument could be made on it without instruction to base it on, and no such charge having been given, no argument was made on the statute of frauds to the jury." We cannot understand how appellee's counsel have so stated in their brief, because such is manifestly not the fact as the court can clearly see from the record.

Gex & Waller, for appellee.

Now while we submit there is no proof at all in the record to support any theory to avoid the contract involved in this matter because of the statute of frauds, and while we contend that the statute of frauds proposition could not be raised but by a special plea, to be tried specially, yet for the purpose of following counsel in their argument, we submit that this contract was not within the statute of frauds, even if the jury had found for the defendant, thereby establishing that same might not have been completed within one year.

In re Chaffe & Sons v. Benoit, 60 Miss. 39, this court stated: "Here is no force in the objection that the lease was for more than a year, and was void because not in writing. It was for the "crop season of 1880" which might or might not be for more than twelve months, it is lawful, though its actual completion may in fact require a longer period. *Brown on the State. Fr.*, sec. 273, *et seq.*"

This court has held time and again that where no time of performance is fixed in the contract, same will never be presumed to be in violation of the statute of frauds, and in the case of *Duffy v. Snyder*, 54 Miss. 252, this court said:

"It is unnecessary to decide whether this principle would justify a recovery of the price of a house built upon another's land, under a void contract, without proof of a taking possession or use of the house by the landowner (which this record leaves doubtful); because the verdict and judgment here are sustained by other proof in the record. It was proved that, in 1873-74, when, Snider was about to make some additions to the house, Mrs. Duff told him that she was afraid that he was going to make the house too costly; but that, if he would do nothing further, she would pay for it; and Snider thereupon forebore to make the additions. There was no time fixed by this agreement for making the payment; and it is well settled that, when no time of performance is fixed, the contract will never be presumed to be in violation of the statute of frauds." *Jackson v. Railroad*, 76 Miss. 607; *Tate v. Stockstill, et al*, reported in 52 So. 192.

From the above it will be seen that, regardless of what the rule is in other states, in Mississippi, the parties by their contract must expressly provide that it will last over a year to bring a contract within same, and whether it lasts over a year or not will not avoid it, if the contract does not provide for it to extend over that period. Certain it is that the contract in this case did not provide that it should extend over a year, and certain it is that it could have been completed within a year.

But there is another reason why the court did not err in refusing to grant any instruction on the question of the statute of frauds, even though we could get beyond the questions hereinabove discussed, and that is, that this contract being personal, could and would terminate with the death of either individual, and therefore it comes strictly within the rule set out in the *Tate* case and the

Jackson case hereinabove cited. That the contract was personal, there can be no question, because certain it is that a court could not have required the administrator of the appellee to have carried same out, had he died within the year. *Howe Sewing Machine Co. v. Rosensteel*, 24 C. C. 583; *Shultz v. Johnson*, 44 Ky. 497; *Gauss v. Haussman*, 22 Mo. App. 115; *Huling v. Chester*, 19 Mo. App. 607; *Dickinson v. Calahan*, 19 Pa. St. 227; *Winslow v. Fraser*, 30 Vt. 522, 41 Me. 258; *Carver v. Miller*, 4 Mass. 559; *Stinson v. Prescott*, 81 Mass. 335; *Harrison v. Conlan*, 92 Mass. 85; *Brown v. McDonald*, 129 Mass. 666; *Babbitt v. Ridder*, 1 Grant Cas. 161; *Brown v. Fairhall*, 100 Me. 556.

From the foregoing it will be seen: First: That there was no testimony at all before the court in support of the fact that the contract would require a longer period of time than one year to complete, while on the other hand, he who did not have the burden to establish such a fact assumed and proved it, at least to the satisfaction of the jury, the arbiters of the facts. Second: Regardless of what the law might be in other states, in Mississippi before a contract will be declared to be within the statute of frauds, the parties must by express stipulation place it therein. Third: A contract for life, or one that might terminate by the death of either party, is not within the statute of frauds, even though it is contemplated that either party might live over a year because there is a possibility of death within that time.

Therefore we submit that it was proper both as a question of fact and of law, for the lower court to refuse to submit to the jury the validity of the contract on the plea, or the supposed plea, of the statute of frauds.

SMITH, C. J., delivered the opinion of the court.

Appellee instituted this suit in the court below to recover of appellants damages alleged to have been sustained by him because of the breach by appellants of a

parol contract, by which, according to his evidence, he agreed to deliver to appellants' mill all of the logs which could be obtained from the timber on certain described land, appellants agreeing to pay him therefor thirty-five cents per log, two hundred logs, neither more nor less, to be delivered each day, excluding Sundays, till the entire number thereof which could be obtained from the land had been delivered. One of appellants' defenses is that the contract was void under the statute of frauds, because it was "not to be performed within the space of one year from the making thereof." In support thereof, evidence was introduced by them to the effect that there were between ninety thousand and one hundred thousand logs on the land. The evidence for appellee was to the effect that the number of logs on the land was between forty thousand and fifty thousand. One of the instructions requested by appellants and refused by the court was as follows:

"The court instructs the jury for the defendant that a suit cannot be maintained on any oral contract which is not to be performed within the space of one year from the making thereof, and that therefore if the jury believed from the evidence that the number of logs to be handled could not be handled under the contract at the rate of two hundred per day within one year from the beginning of said work they should find for the defendant."

If the number of logs to be delivered under this contract amounted to ninety thousand, the contract could not have been performed within one year from the making thereof, for, since appellee could not be required to deliver nor appellants to receive more than two hundred logs per day, it would have required four hundred and fifty days to deliver them.

But it is said by counsel for appellee "that this contract, being personal, could and would terminate with the death of either individual," which death might have

occurred within the year, and therefore the contract is not within the statute. Conceding for the sake of the argument that the death of either party to this contract would have terminated it, it would certainly not thereby have been fully performed, and the rule is that:

“If the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute (*Mallett v. Lewis*, 61 Miss. 105); but if his death would leave the agreement completely performed and its purpose fully carried out, it is not.” *Jackson v. Railroad Company*, 76 Miss. 607, 24 So. 874; *Doyle v. Dixon*, 97 Mass. 208, 93 Am. Dec. 80.

If the number of logs to be delivered amounted to ninety thousand, the contract sued on is within the statute of frauds and the instruction hereinbefore set out should have been given, for:

“The clause of the statute in regard to agreements ‘not to be performed within the space of one year from the making thereof’ means to include any agreement which, by a fair and reasonable interpretation of the terms used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making.” 2 Elliott on Contracts, secs. 1277 and 1287.

Reversed and remanded.

110 Miss.]

Statement of the case.

BANK OF COLLINS ET AL v. MILLER.

[71 South. 12.]

ATTORNEY AND CLIENT. *Suit for fee. Decree.*

Where two attorneys had recovered judgment for a client against a lumber company and the sureties on its bond of which judgment they were entitled to a part as attorney fees, and the lumber company paid the amount of the judgment to a bank and said bank paid over to one of the attorneys, D. all of the other attorney M's part of such judgment except three hundred dollars which money so paid said attorney remitted to his associate M. The bank claimed that the attorney D owed it three hundred dollars and, with the consent of D, credited this amount upon the debt owing it by D, who thereupon marked the judgment satisfied of record. In such case where the attorney M sued his associate and the lumber company and the bank for the three hundred dollars not paid him, he could only recover against the bank which was in possession of the money.

APPEAL from the chancery court of Covington county.
HON. R. B. BULLARD, Special Chancellor.

Suit by R. N. Miller against the Bank of Collins, E. L. Dent, and others. Decree for complainant against all the defendants except one and they appeal, and complainant cross appeals from the decree dismissing the other defendant.

Appellee filed a bill in chancery alleging that he and appellant Dent, as attorneys for one Parker, had recovered a judgment in the circuit court against the Wood Lumber Company and Rutledge, surety on the bond of said company, and that thereafter said lumber company had paid the amount of said judgment over to the Bank of Collins of which Rutledge was cashier, and that appellee and Dent were entitled to a portion of said amount as attorney's fees; that said bank had paid over to Dent the amount due appellee, except three hundred dollars, and Dent had remitted all of appellee's fees except said three hundred dollars. It seems from the record that ap-

pellant Dent claimed that appellee owed him three hundred dollars and the Bank of Collins claimed that Dent owed it three hundred dollars, and that, after the bank had paid over to Dent all of the attorney's fees due appellee and Dent except the three hundred dollars, Dent then marked the judgment satisfied of record, and had receipted the bank for the full amount. Appellee prayed that he be given a personal decree against the defendants for the amount due him. The court entered a decree discharging the Wood Lumber Company and Rutledge, and against the Bank of Collins and Dent for the sum of three hundred dollars and interest, from which decree both of said defendants appeal, and appellee prosecutes a cross-appeal from that part of the decree relieving the lumber company and Rutledge of liability.

SYKES, J., delivered the opinion of the court .

The appellee R. N. Miller filed his original bill in the chancery court of Covington county against the Wood Lumber Company, the Bank of Collins, J. F. Rutledge, and E. L. Dent, claiming that they were due him the sum of three hundred and thirty dollars, as a balance arising from several different transactions. The questions involved here are purely questions of fact, and were decided in the court below in favor of the appellee and against the Bank of Collins and E. L. Dent. The testimony in the case, however, shows that the Bank of Collins is in possession of this money, and not the defendant Dent. The appellee has filed in this court a confession of error as to the appellant E. L. Dent, and has agreed thereby that the decree of the chancery court may be reversed as to the said Dent, and the said Dent dismissed from this suit.

It is the opinion of the court that the decree of the court below is correct as to the defendant Bank of Collins, and is affirmed to that extent. Under the facts in the case, the decree as to the defendant Dent is erroneous, and is reversed and dismissed as to the said Dent.

Affirmed on cross-appeal.

110 Miss.]

Statement of the case.

KANTROVITZ v. McNEILL.

[71 South. 13.]

JUSTICE OF THE PEACE. *Jurisdiction. Amount of controversy. Reduction of claim.*

Where an open account is first made out and presented for payment exceeded in amount the sum of two hundred dollars, the limit of a justice of the peace jurisdiction, and the creditor, acceding to the claim of the debtor that several of the items was an improper charge, acquitted the defendant from liability therefor, and credited him accordingly and omitted the items from the account, and the balance was within the jurisdiction of the magistrate, a suit subsequently brought on the account was properly begun in a justice court, and the rule for bidding the splitting of causes of action had no application.

APPEAL from the circuit court of Leflore county.

HON. MONROE MCCLURG, Judge.

Suit by Jake Kantrovitz, against Mrs. J. Y. McNeil. The circuit court on appeal from a justice of the peace, dismissed the suit for want of jurisdiction, and plaintiff appeals.

Appellant, who was plaintiff in the court below, filed suit in the justice court against appellee on open account for one hundred and ninety-five dollars and twenty-five cents for merchandise furnished appellee's minor sons. On the trial *de novo* in the circuit court, the case was heard by the judge, a jury being waived, and the suit ordered dismissed for want of jurisdiction in the court of the justice of the peace. The record shows that the account as originally presented by appellant to appellee was for two hundred and two dollars and sixty-five cents, and included certain items for "cleaning and pressing" amounting to seven dollars and forty cents, which items appellee denied liability for, claiming that she had not authorized this expenditure. Before the suit was filed, the items aggregating seven dollars and forty cents were

deducted from the account and suit brought for the balance.

Kimbrough & Kimbrough, for appellant.

X. R. Coleman, for appellee.

HOLDEN, J., delivered the opinion of the court.

The facts as testified in the lower court show that the court of the justice of the peace had jurisdiction of this lawsuit; consequently, on appeal to the circuit court, that court had jurisdiction, and should not have dismissed the case.

This case comes within the rule announced in *Vicksburg Waterworks Co. v. Ford*, 97 Miss. 198, 52 So. 208.

Reversed and remanded.

MAYES v. COLEMAN ET AL.

[71 South. 14.]

1. VENDOR AND PURCHASER. *Contracts. Constitution. Term of payment. Waiver. Mortgages. Vendor's lien. Priority.*

Where complainant through her agent and attorney entered into a written contract for the sale of lands, agreeing in consideration of two hundred dollars to be paid in Jackson, Mississippi, free from any exchange and the further consideration of one thousand dollars, to be paid in cash at Jackson free of any exchange, to convey the defendant a specified tract of land, and the contract provided that it should be sent to a bank and delivered to defendant when the first cash payment was sent to complainant at Jackson free of exchange, the deed to be made upon the same condition. New York Exchange for the first payment was sent to complainant and collected by her in the usual course of busi-

ness and the contract delivered to the bank. Thereafter defendant borrowed from another a sum of money to make the last payment and gave a deed of trust on the land to secure the money, which money was deposited in a bank at the place where the deed was to be delivered, and that bank drew a draft on New York, which was delivered to complainant's agent, who sent it to complainant's agent at Jackson, but the draft was not paid because of the insolvency of the drawing bank. In such case under the terms of the contract, payment in cash at Jackson had to be made before defendant was entitled to a deed.

2. **VENDOR AND PURCHASER. Terms of payment. Waiver.**

In such case, the fact that complainant had previously accepted and collected New York Exchange for the first payment, and that her agent received a New York draft, did not show a waiver of her right to demand payment in cash at the place agreed upon, since it is a well settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the *prima facie* presumption arises that the check was taken merely as a conditional, not absolute, payment, and in case the check is not honored upon due presentation, the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor's liability on the check.

3. **MORTGAGES. Vendor's lien. Priority.**

In such case where the mortgagee of the vendee was fully informed of the terms of the contract of purchase and was aware of the fact that this balance of one thousand dollars was due the vendor, his rights under his mortgage will be subordinated to the rights of the vendor.

APPEAL from the chancery court of Lincoln county.

HON. P. Z. JONES, Chancellor.

Bill by Mrs. Leila B. Mayes against C. C. Coleman and others. From a decree dismissing the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

Geo. Butler and *R. B. Mayes*, for appellant.

H. V. Wall, for appellees.

SYKES, J., delivered the opinion of the court.

The appellant filed her original bill in the chancery court of Lincoln county, praying that she be adjudged to have a lien on certain lands described in said bill, for the balance of the purchase money of one thousand dollars due her, and that said lands be sold to satisfy said indebtedness. The appellee C. C. Coleman denied that there was any balance due appellant. The appellee Bartlett Calcote, in his answer to said bill, states that he loaned C. C. Coleman the one thousand dollars with which to pay off the balance due the appellant, and that he took a deed of trust on the lands to secure the same. A decree was rendered in the court below, dismissing the appellant's bill, from which decree this appeal is prosecuted.

The material facts in the case are as follows: On August 25, 1913, Robert B. Mayes, the agent and attorney for the appellant, and C. C. Coleman, one of the appellees, entered into a written contract for the sale of the lands involved in this controversy. The said contract provided, among other things, that:

"In consideration of two hundred dollars to be paid in Jackson, Miss., free of any exchange, and the further consideration of one thousand dollars, to be paid in cash at Jackson, Miss., free of any exchange, said last amount to be paid on the first day of January, 1914, I agree, as the agent and attorney for Mrs. R. B. Mayes, to convey to C. C. Coleman a certain tract of land containing about two hundred and eighty acres and lying and being in Lincoln county, Miss.," etc.

The other paragraph in said contract material to this controversy reads as follows:

"This contract is to be sent to the Brookhaven Bank and delivered to C. C. Coleman when the first cash payment is sent to me at Jackson, Miss., free of exchange. The deed is to be made on the first of January, upon the same condition."

New York exchange for two hundred dollars was sent to the appellant, and collected by her in the usual course of business. Some time in December, 1913, the appellee Mr. Coleman became quite anxious to obtain possession of the land, and took the matter up with the husband of appellee, who wrote him that he would write an attorney in Brookhaven to prepare the deed to the land and send to him for the signature of Mrs. Mayes. In this letter he further stated that the appellee could not get possession of the land before the 1st of January. On December 27th, the husband of appellant wrote the following letter to Mr. Luther L. Tyler, Brookhaven, Miss.:

"I send you the deed to Mr. Coleman. It is understood this deed is not to be delivered to him until he pays the balance due of one thousand dollars, free of exchange at Jackson. In other words, if you will turn to my contract you will see that it calls for payment of this money at this place without cost to me. Please be kind enough to see that this is done, and send your bill for preparation of the deed. He has paid me two hundred dollars, leaving a balance due of one thousand dollars. Kindly acknowledge receipt and oblige," etc.

The appellee C. C. Coleman, after the contract between himself and the appellant for the purchase of lands had been executed, borrowed from the appellee Calcote, the amount of one thousand dollars, with the agreement and understanding that Coleman was to pay this one thousand dollars to the appellant as the balance of the purchase money due on said land. Coleman then gave Calcote a deed of trust on said land to secure the payment of this money. Calcote was fully informed as to the contract between the appellant and the appellee Coleman, and was also aware of the fact that this balance of one thousand dollars was due the appellant; in fact, it was fully understood between Calcote and Coleman that this money was to be used for that purpose. The one thousand dollars was then deposited in the Commercial Bank & Trust Company of Brookhaven to the credit of Mr. Coleman, with

the understanding between Coleman, Calcote, and Mr. L. H. Baggett, assistant cashier of said bank, that the money was to be paid to the appellant as the balance due her for the purchase price of said land.

The testimony further shows that the appellee Coleman instructed Mr. Baggett to get the deed from Mr. Tyler and pay the balance of the purchase money on said land. It is also undisputed that Mr. Baggett was shown a copy of the contract for the purchase of these lands, executed by Mrs. Mayes and Mr. Coleman. Mr. Tyler took the deed to the bank and showed Mr. Baggett the letter from Judge Mayes accompanying the said deed. Mr. Baggett then rang up the appellee Coleman and read to him the deed, and asked him if the deed was satisfactory, to which Coleman replied that it was. Baggett then gave Tyler a New York exchange for the sum of one thousand dollars, payable to R. B. Mayes, who was the agent of appellant. This exchange was taken by the attorney, Mr. Tyler, and was immediately mailed to Judge Mayes at Jackson. It reached Jackson the last day of December, and was in due course deposited in one of the Jackson banks for collection on January 2d, January 1st being a legal holiday. When the exchange reached New York it was not paid, for the reason that the Commercial Bank & Trust Company of Brookhaven had failed. Judge Mayes immediately notified Mr. Coleman that the exchange had not been paid, and requested him to pay the said one thousand dollars, as the balance due for the purchase price of the land. Mr. Coleman declined to do so, claiming that he had paid the same through Mr. Baggett, as above set out.

The only two questions for decision here are: First, where the payments to be made under the said contract, whether in Jackson or Brookhaven? and, second, if the payments were to be made in Jackson, under the contract, then was this provision of the contract waived by the appellant, or her agent, Judge Mayes?

The contract states that both payments were to be made in cash, at Jackson, Miss. free of any exchange. We think a mere quotation of this part of the contract shows beyond all question that it contemplates that the money was actually to be paid to the appellant or her agent in Jackson. The fact that New York exchange was sent to the appellant in payment of the two hundred dollars, and was duly collected by the appellant, does not show in any way any waiver on the part of the appellant of the place at which these payments were to be made. The contract simply means that there is no payment until the money is actually in the hands of the appellant in Jackson; and the depositing of the New York exchange in each instance was in no wise an acceptance of the same as payment. It is contended by the counsel for the appellee that the phrase, "free of exchange" simply means that the face value of the exchange in Jackson should be the amount of the indebtedness. To this proposition we do not agree. The meaning of the contract is simply that the money must be actually paid in Jackson, and that the mere depositing of New York exchange, or of a check, is not an acceptance in lieu of the actual money, and does not become a payment until the money has actually been paid as called for by the said check or exchange.

Counsel then contend that this part of the contract was waived by the appellant's authorizing her attorney, Mr. Tyler, to turn over the deed and get the money. A complete answer to this contention, however, is that Mr. Tyler did not get the money, but got a New York exchange; another answer is that Tyler did not have authority to accept New York exchange in place of the money. The authority under which Tyler acted was known to Mr. Baggett, who was the agent of the appellee Coleman in the payment of this money. When Mr. Tyler was sent the deed by Judge Mayes, he was fully instructed about the contract and that payment should be made in Jackson; and a copy of the contract was sent him, which copy was shown by him to Mr. Baggett, the assistant cashier of the

bank, who was representing the appellee Coleman in this transaction. The record in this case fails to disclose any testimony whatever upon which the contention of a waiver of this clause of the contract can be based. In the case of the *Bank of Greenville v. Kretschmar et al.*, 91 Miss. 608, 44 So. 930, the question of what effect the delivery of a check to a creditor has as to payment of a debt was discussed by the court as follows:

“In 22 Am & Eng. Ency. of Law (2d Ed.) page 569, it is said: ‘It is a well-settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the *prima facie* presumption arises that the check was taken merely as conditional, not absolute, payment, and in case the check is not honored upon due presentation, the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor’s liability on the check.’ ”

In the same opinion it is further stated:

“A check is not payment, unless the check is paid, unless it is specially agreed by the parties that the check, whether good or not, shall have that effect; and the burden of proof always rests on the party asserting it to show that the check was to have that effect. The presumption is against its being so received, and this presumption can only be overcome by clear proof to the contrary.”

New York exchange has no more sanctity than a check. We therefore hold that there was no payment of the one thousand dollars to the appellant. At the time the appellee Calcote took his deed of trust on this land, he was aware of the claim of the appellant. Consequently his claim is subject to the superior claim of the appellant.

. *Reversed and remanded.*

EMINENT HOUSEHOLD OF COLUMBIAN v. LUNDY.

[71 South. 16.]

CORPORATIONS. *Notice to corporation. Sufficiency of compliance.*

Under Code 1906, section 920, providing that process may be served on the agent of a foreign corporation within the county where suit is brought, regardless of the character of the agency, but requiring that the clerk, when return of the services is made, shall mail a copy of the process to the home office of the corporation by registered letter and file a certificate of such mailing, in the absence of which no judgment shall be valid, where summons was issued under the statute, but the clerk failed to mail the notice as required, a judgment by default against such corporation was erroneous there being no valid notice.

APPEAL from the circuit court of Neshoba county.

HON. C. L. DOBBS, Judge.

Suit by Slocum Lundy against the Eminent Household of Columbian Woodmen. Default judgment for plaintiff and defendant brought *certiorari* to circuit court wherein judgment was rendered for plaintiff and defendant appeals.

On April 20, 1912, appellee brought suit in the court of a justice of the peace of Neshoba county against appellant for the sum of one hundred dollars. A summons was issued directed to appellee, and on April 24th the constable made the following return:

"I have this day executed the within writ by delivering to J. F. Guthrie, consul commander, and to Melton Lundy, agents and representatives of defendant, whose place of business is in Neshoba county, Miss., district No. 1 thereof, a true copy of this writ."

On May 1st, the return day of the court, a judgment by default was rendered against appellant. No notice was given appellant by the justice of the peace, and no copy of the summons mailed to him as directed by section 920 of the Code of 1906.

After the time for an appeal to the circuit court had elapsed appellant learned of this judgment, and filed its

petition in the circuit court asking for a writ of *certiorari*. The record was brought up, and on the hearing before the court, a jury being waived, a judgment was rendered against the appellant, from which an appeal is taken.

Section 920 of the Code is as follows:

"920. Process may be Served upon Agent.—Process may be served upon an agent of said corporation found within the county where the suit is brought, no matter what character of agent such person may be; and in the absence of an agent, it shall be sufficient to serve the process upon any person, if found within the county where the suit is brought, who represented the corporation at the time of the transaction out of which the suit arises took place, or if the agency through which the transaction was had be itself a corporation, then upon any agent of that corporation upon whom process might have been served if it were the defendant. The officer serving the process shall state the facts, upon whom issued, etc., in his return, and service of process so made shall be as effectual as if a corporation of this state were sued, and the process has been served as required by law; but in order that defendant corporation may also have effectual notice, it shall be the duty of the clerk to immediately mail a copy of the process to the home office of the corporation by registered letter, the postage and fees of which shall be taxed as other costs. The clerk shall file with the papers in the cause a certificate of the fact of such mailing, and make a minute thereof upon the docket, and no judgment shall be taken in the case until thirty days after the date of such mailing.

Huddleston & McKisson, H. L. Austin and J. W. Ward,
for appellant.

HOLDEN, J., delivered the opinion of the court.

The judgment of the justice's court was erroneous on account of no legal service on the defendant.

Reversed and remanded.

MOLPHUS v. BOSTIC LUMBER & MANUFACTURING COMPANY.

[71 South. 16.]

1. JUSTICE OF THE PEACE. Jurisdiction. Residence of defendant. Validity of judgment. Restraining enforcement.

A justice of the peace is without jurisdiction of a cause against a resident of another district where the debt was contracted and the liability incurred, and which had a justice qualified to act, and a judgment by default in such case was void.

2. JUSTICE OF THE PEACE. Jurisdiction. Judgment. Restraining enforcement.

Where lands of the debtor are levied upon under execution from a void judgment the purchaser of such land from the debtor need not show a good defence to the original action, in order to restrain the sale under such execution.

APPEAL from the chancery court of Lauderdale county.

HON. SAM WHITMAN, Chancellor.

Suit by Mrs. M. J. Molpus against the Bostic Lumber & Manufacturing Company. From an order sustaining a demurrer to the bill, complainant appeals.

The facts are fully stated in the opinion of the court.

W. L. Scott, for appellant.

That the judgment is void, cannot be denied successfully in the light of section 2724, Code of 1906, in part as follows: "But every freeholder or householder of the county shall be sued in the district in which he resides, if there be a justice (of the peace) acting therein and qualified to try the suit, or in the district in which the debt was contracted, the liability incurred, or in which the property may be found." Also *Turner v. Lilly*, 56 Miss. 576; *Heggie v. Stone*, 70 Miss. 39, 12 So. 253; *Hilliard v. Chew*, 76 Miss. 763, 25 So. 489; *Nation v. Lovejoy*, 25 So. 494, to the effect; *Hilliard v. Chew*, Ib. "A judgment by default on personal service before a justice of the peace in a different district than that in which the defendant is a resident, freeholder, or householder, and in

which the debts were contracted, and in which there is an acting justice of the peace qualified to try the action, is void."

Now as to the duty owing by complainant to Bostick, Lumber & Manufacturing Company, defendant, she (complainant) shows and it is admitted that her resources, after wasting, his own, and that in May, 1913, he owed her the handsome sum of two thousand, seven hundred and fifty-five dollars, while at the same time, the Bostick Lumber and Manufacturing Company had such a claim against him as amounted to two hundred, seven and fifty-one-hundredths dollars. Also that at one time she had furnished her son money to pay this debt but he would not, so he was sued by the Bostick Lumber & Manufacturing Company, who knew the law and knew that in order to obtain a valid judgment, it must bring its suit in the proper justice district, but nevertheless it elects to bring suit against him in a district other than that of his residence where the debt was contracted and where there was an acting justice, qualified to try same, and it takes a void judgment as a result thereof, to which she is not a party or privy by any means at all with either party, and in which she has no voice whatever, which void judgment is at once enrolled. Five days later she procures a conveyance to herself of the interest of her son in and to the land in question, taking a warranty deed to same which is at once recorded, which land according to the bill which is admitted lacks two hundred and fifty-five dollars of being worth as much as her *bona fide* debt against him. Her debt is admittedly valid, her right to collect cannot be denied. Self preservation is the first law of nature. *Cary-Haliday Co. v. Cain*, 13 So. 239. "The law requires good faith, but it does not pronounce it bad faith for one to look after his own interests and protect them, requiring only, in doing so, that he must not do anything in fraud of other creditors." *McAllister v. Honea*, 14 So. 264.

“That a conveyance in honest payment of a real debt is brought about by the action of the other creditors in pressing their claims, does not make it fraudulent. For a real debt, a conveyance may be made, even though other creditors are pressing. *Ferguson et al v. Oxford Merc. Co.*, 27 So. 877.

“That a bank holding a claim against an insolvent corporation induced its stockholders to fill vacancies in its board of directors, in order that it might authorize a sale of its property to the bank to pay its debts, and took advantage of its proximity to the corporation to prefer its claim, did not invalidate such transfer, as against other creditors of the corporation. It seems to have used this advantage as it had the legal right to do, and no doubt the other creditors would have made the same use of the same advantage in collecting.” *Graham v. Morgan*, 35 So. 874.

“During the pendency of an action against him, a husband can convey property to his wife, if no fraud can be proved. If it is in payment of a *bona fide* debt and for a debt that is actually in amount equal to the value of the property conveyed, although it is probable that the property would not be so conveyed if it were not for the suit then pending, this is no evidence of fraud, and under uniform decisions of our court, he has a right to prefer creditors.”

As said in the last case cited, it may be that the property would not have been conveyed to complainant at this time, but for this suit pending (or the attempted institution of same), be that as it may, she had the right to collect her debt.

Under these decisions she evidently had the unqualified right to collect her *bona fide* debt, even though in doing so, she rendered it likely that the corporation could not collect its debt, but she had the right to look to her own fences, so long as she acted in good faith, and *bona fide*, which the bill shows she did, and which is admitted by the demurrer.

Sams & McCall and Baskin & Wilbourn, for appellee.

The first question to be considered is whether or not the judgment in favor of the *Bostick Lumber & Mfg. Co. v. C. L. Molpus* taken in the justice court was valid or void. The justice court had jurisdiction both of the persons and the property. The suit was had upon a promissory note executed in Meridian, Mississippi, by C. L. Molpus to the Bostick Lumber & Mfg. Co., April, 1909, payable at the Citizen's Nat'l Bank of Meridian, Mississippi, November 15, 1909. Said note provided for eight per cent interest per annum after maturity and provided for a reasonable attorney's fees if suit should be instituted to enforce payment thereon. The amount of the note came within the jurisdiction of the justice court and the note was made payable in Meridian, Mississippi, in district, one, of Lauderdale county, said state. Therefore, the court had jurisdiction both of the person and the amount involved. A judgment by default was taken by the plaintiff on said note May 26, 1913.

More than ten days after the date of the rendition of said judgment, a motion was filed by C. L. Molpus, defendant, to set aside said judgment as being void, on grounds that the suit should have been filed in Beat 5, instead of Beat 1. The record shows that personal service was had on the defendant more than five days before the judgment was taken. Said judgment was a good and valid judgment and was not subject to attack by the defendant, on said motion.

"Judgments are not merely *prima facie* evidence of their validity, but conclusive; and the parties to them are estopped by the record from denying their obligatory force, where the jurisdiction of the court appears by the record." (*Anderson Miller, et al v. Samuel Ewing, et al.* 8 Sm. & M. 421, *et seq.*) 5 Sm. & M. 210; 8 Sm. & M. 505; George's Digest, page 9437, section 15; 6 Sm. & M. 485; 41 Miss. 561; 2 G. 119-578; 2 G. 704-687; 2 G. 290; 2 H. 727-902.

"The record being the sole embodiment of the judicial proceedings, no other materials or utterances, oral or written, can be set up in competition with it. The law requires the record to be complete, and when it so purports to be on its face in law it is complete, and it is not subject to impeachment. A party to be affected by the record, and desiring it to be complete before it is signed by the judge, but the exercise of ordinary care can see to it that it is correctly made up, and if he fails to do so he cannot afterwards complain. *Childress v. Carley*, 92 Miss. 573 and 574.

The record of the judgment was complete and showed jurisdiction in the justice court and the justice of the peace correctly overruled the motion of the defendant to dismiss the judgment, the judgment being complete on its face, showing jurisdiction.

The complainant (appellant herein) came into the court of equity, seeking relief from the equity court and failed to offer to do equity. This, of course, was not countenanced by the chancery court and the demurrer to her bill was sustained. "He who seeks equity must do equity." (*Walker-Durr & Co. v. Mitchell*, 52 So. 583); also, "one who seeks the interposition of a court of equity to enjoin the execution of a judgment at law must show not only the existence of those defects which warrant the intervention of the court, but also that there is a valid defense to the claim on which the judgment is founded." (*Stewart v. Brooks*, 62 Miss. page 493, and the cases therein cited.)

The appellant failed, in her bill of complaint, to conform to the requirements of the above established principle of law cited, and for this reason, the demurrer was sustained by the chancery court.

In conclusion, we respectfully submit, that the judgment in the justice court in favor of *Bostick Lbr. & Mfg. Co. v. C. L. Molpus* was valid because the court had jurisdiction of the person and the subject-matter, as shown by its records, and was not subject to attack by parole tes-

timony as shown by the authorities first above set out. 1. Record of the justice court imports verity and cannot be attacked by parole testimony. 2. The chancery court correctly sustained the demurrer of appellee herein to bill of complaint of appellant herein, and his action is justified by the last two cases sighted above, to-wit: *Walker-Durr & Co. v. Mitchell*, 52 So. 538; *Stewart v. Brooks*, 62 Miss. 493.

We respectfully submit that the decree of the lower court should be affirmed.

SYKES, J., delivered the opinion of the court.

Appellant here (complainant below) filed an original bill in the chancery court of Lauderdale county against the appellee (defendant), seeking to enjoin the sale of certain lands therein described under an execution issued upon a judgment obtained in a justice of the peace court in Meridian against the son of complainant. The bill alleges, in substance, that the appellant purchased the lands for a valuable consideration from her son after the above judgment was enrolled against him, but before the execution thereon was issued. She alleges that the judgment was void because the suit was filed in district N. 1 of Lauderdale county, when the defendant (her son) was a resident citizen of district No. 5, and was a freeholder and householder of said district, and that the debt was contracted and all the liability incurred in said district No. 5; also that at the time her son was sued in district No. 1 there was a justice of the peace acting and duly qualified to try the suit in said district No. 5. The bill of complaint followed section 2724 of the Code of 1906 as to these allegations, and shows that the justice of the peace of district No. 1 had no jurisdiction to try said cause. A judgment was taken by default in said suit. A demurrer was sustained to the bill upon two grounds. The first is that the justice of the peace had jurisdiction, and that the judgment sought to be enjoined is therefore

valid; second, that complainant, while seeking relief in equity, has failed to offer to do equity; that before she can maintain her bill in this case it was necessary for her to show that there is a valid defense to the claim on which the judgment in the justice of the peace court was founded.

As to the first proposition, this court has held under practically a similar statement of facts that a judgment obtained as this was, is a void judgment and may be perpetually enjoined. The court in part says:

"As the justice of the peace of district No. 4 did not acquire jurisdiction of the cause of action between the parties, the judgment against Chew was void, and the decree giving him a perpetual injunction against it is approved." *Hilliard v. Chew*, 76 Miss. 765, 25 So. 489.

Defendant relies upon the cases of *Stewart v. Brooks*, 62 Miss. 493, and *Walker-Durr Co. v. Mitchell*, 97 Miss. 231, 52 So. 583, to maintain the proposition that it devolved upon complainant to state facts in her bill showing a valid defense to the claim on which the judgment was obtained. The case of *Stewart v. Brooks*, in 62 Miss., was where Brooks filed the bill for an injunction against the execution of a judgment recovered against him. He failed to allege that the notes upon which he was sued had been paid, or that he had a good defense to them. In the case of *Walker-Durr & Co. v. Mitchell*, in 52 So. a bill to enjoin the issuing of an execution on a judgment was filed by the Walker-Durr Company against Mrs. Mitchell and others. The material facts in that case were that Mrs. Mitchell had rented some land to one Hugh Bass, and the two Bales of cotton raised on this land, upon which Mrs. Mitchell had a landlord's lien, were sold to the Walker-Durr Company. An attachment was sued out by Mrs. Mitchell, and these two bales of cotton were levied upon. Thereupon the Walker-Durr Company signed the replevin bond of the tenant sued. Judgment was duly rendered in favor of the landlord and against the defendant and Walker-Durr Company as surety for

the amount of one hundred dollars. In its opinion the court in part said:

"It was incumbent on Walker-Durr Company to allege in their bill and prove that they had a valid defense to the demand on which the judgment was founded."

In the present case, however, the complainant was not a party to the suit in the justice of the peace court against her son. At that time she was simply a creditor of her son just as was the defendant in this case. Her son had a perfect right to sell his property to her for a valuable consideration. By purchasing same she in no way became responsible to this defendant or to any other creditor for any debts due them by her son. Since the judgment in this case is absolutely void, there was no lien whatever on the property bought by complainant from her son. In the two cases relied upon by the defendant there was a claim of a debt against each of the parties who filed his bill for an injunction; consequently it was necessary for them to allege in said bill facts showing that the debt was not a valid one against them before they could have any standing in a court of equity. In this case, however, the complainant was neither directly nor indirectly responsible for any debt due by her son to the defendant in this case.

Reversed and remanded.

ADAMS COUNTY v. CATHOLIC DIOCESE OF NATCHEZ.

[71 South. 17.]

1. TAXATION. *Exemptions. Charitable societies. Construction of statutes. Exemptions.*

Under Code 1906, section 4251, cl. d. providing that, all property real or personal, belonging to any religious or charitable society and used exclusively for the purpose of such society and not for profit, shall be exempt from taxation and under section 4252,

providing that all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system, where no dividends are declared, and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county and municipal taxes, the lands of an incorporated catholic diocese the rents which are used to maintain orphans' homes are exempt; the two sections not being in conflict, the latter section merely extending the exemption of the former.

2. TAXATION. *Exemption. Construction of statutes.*

Statutes exempting persons and property from taxation must be strictly construed, but there is a relaxation of the rule in the case of statutes of exemptions applicable to religious and educational institutions, and the supreme test is the intent of the legislature.

3 STATUTES. *Construction. Exemptions. "And."*

In order to obtain the policy and intent of the statute, the disjunctive "or" should be used and read into the act, in the place of the conjunctive "and," conjoining "fraternal and benevolent purposes" referred to in the last part of this provision of section 4252, Code 1906, so as to exempt property of religious institutions.

4. SAME.

Whenever necessary to effectuate the obvious meaning of the legislature, conjunctive words may be construed as disjunctive, and *vice versa*.

APPEAL from the circuit court of Adams county.

HON. R. E. JACKSON, Judge.

Proceeding by the Catholic Diocese of Natchez, against Adams county. From a judgment for plaintiff, defendant appeals.

The facts are fully stated in the opinion of the court.

Richard F. Reed, for appellant.

Gerard Brandon, for appellee.

HOLDEN, J., delivered the opinion of the court.

This is an appeal from the judgment of the circuit court of Adams county abating and striking from the tax rolls

certain real estate in the city of Natchez, rented and bearing revenue, assessed to the Catholic Diocese of Natchez, and declaring that the property, the legal title to which is in the diocese, is exempt from assessment and taxation. A jury was waived, and the case was heard by the judge upon the record of appeal from the board of supervisors of Adams county and an agreed statement of facts. From a judgment adverse to the appellant, it appeals here. The agreed statement of facts is as follows:

"That the allegations and statements in the petition of complainant addressed to the board of supervisors, setting forth the assessments complained of and the proceedings had in said board, leading up to the rendition of the final order appealed from, are true and correct as stated.

"That the legal title to the properties assessed is correctly stated in said petition to the board of supervisors (praying to have the assessment thereof abated and stricken from the rolls), to be in the Catholic Diocese of Natchez, Incorporated; but said title is held in trust for the Catholic congregation of St. Mary's Cathedral in the City of Natchez, Adams county, Mississippi.

"That the Right Reverend John E. Gunn is the Bishop of Natchez, embracing in his diocese and jurisdiction all the Catholic parishes and missions in the state of Mississippi, with his episcopal residence in the city of Natchez, and that the Very Reverend P. C. Hayden is Vicar General of Natchez, with his residence in said city.

"That the plaintiff 'Catholic Diocese of Natchez' is a religious corporation duly incorporated under the laws of the state of Mississippi, its charter of incorporation having been approved by the Governor on September 7, 1905, and being now recorded in Book No. 13, page 546, of the Books of Incorporation in the office of the secretary of state, and also in Book 4-A, page 817, of the Records of Deeds of Adams county, Mississippi.

"That a certified copy of said charter will be herewith filed, and is here referred to as Exhibit A to this agreed statement of facts.

"That said Right Reverend John E. Gunn, as Bishop aforesaid, is *ex officio* the chief officer of said religious corporation, and said Very Reverend P. C. Hayden, as Vicar General of Natchez aforesaid, is *ex officio* the secretary thereof.

"That prior to the incorporation of the said Catholic Diocese of Natchez the legal title of the several properties, the assessment of which is complained of and appealed from (as well as other properties hereinafter mentioned), was vested in the Right Reverend Thos. Heslin (since deceased), the then Bishop of Natchez, who held the title thereto in trust for the aforesaid Catholic congregation of St. Mary's Cathedral, a religious society of Catholics in said city of Natchez, to whom the equitable and beneficial interest and title belonged.

"That after the incorporation of said 'Catholic Diocese of Natchez' and pursuant to the object and purpose thereof, and of the authority given to it by said charter 'to receive and hold the titles to all the property, real and personal, belonging to the several Catholic congregations, parishes, and missions in the state of Mississippi, in trust for said congregations, parishes, and missions, respectively,' the said Right Reverend Thos. Heslin, Bishop of Natchez aforesaid, on September 1, 1906, conveyed to said corporation 'Catholic Diocese of Natchez,' in trust for said Catholic congregation aforesaid, by deeds of record, all the properties theretofore held in trust by him as aforesaid in the county of Adams, state of Mississippi, being the two pieces of property assessed (which assessment is appealed from), and also the land at the southeast corner of Union and Main streets, in Natchez, on which is located the St. Mary's Cathedral and the Bishop's residence; the land at the southwest corner of Main and Union streets, in Natchez, on which is the Cathedral School and the dormitory occupied by the Brothers in charge of said school; the old Catholic Cemetery; the new Catholic Cemetery; certain cemetery lots formerly part of 'potter's field'; two lots of land adjoining Devereux Hall Orphan Asylum

and used by said asylum. Afterwards R. Lee Parker conveyed to said corporation three and one half acres of land in the county (outside the city), upon the same trusts, on which is located a Catholic mission church.

"That the above-mentioned property is all the property in Adams county, Mississippi, the title to which is vested in trust, as aforesaid, for said Catholic congregation, in said corporation.

"That, as already set forth, the Catholic Diocese of Natchez, Incorporated, holds under its charter title to properties in trust only for the several Catholic congregations, parishes, and missions in Mississippi, to which the equitable title and beneficial interest may belong. That said corporation is not for profit. That there is no stock issued and no dividends declared. That the two properties assessed are leased to tenants. That all the revenues therefrom are used for benevolent purposes and no other, and not for profit, to wit: Every cent of the revenues derived from said properties are used and expended in the benevolent work of maintaining, supporting, and providing for poor and dependent orphans in the St. Mary's Orphan Asylum for Girls and the Devereux Hall Orphan Asylum for Boys, in Natchez, Miss., which institutions are supported and maintained by the Catholic congregation of Natchez, with the assistance of other Catholic congregations in Mississippi."

Briefly stated, the facts in the case are the Catholic Diocese of Natchez is a religious society, incorporated, and owns, amongst other church property, two houses in Natchez which it leased to tenants and received rent therefor; that it used this property, not for profit to the society, but used the revenue in rent therefrom for charitable and benevolent purposes in the city of Natchez.

The question presented here is whether or not these two pieces of property, not being used exclusively for the purposes of such religious society, but were leased, and bore a revenue in rent, are subject to taxation under the laws of Mississippi. Section 4251 of the Code of 1906, provid-

ing what property shall be exempt from taxation, in the first sentence of clause "d" of the section reads:

"All property, real or personal belonging to any religious or charitable society, and used exclusively for the purpose of such society and not for profit."

While this provision was then in section 3744, Code of 1892, the case of *Ridgeley v. Redus*, 78 Miss. 352, 29 So. 163, was decided, holding that a benevolent order on the lodge system was not entitled to exemption from taxation of property owned by the lodge not being used exclusively for the purpose of such charitable society. And while this case was pending on appeal to the supreme court the legislature enacted section 4252, Code of 1906, which reads as follows:

"All public libraries and buildings in which the free public schools are taught, and the lots on which the same are situated, not exceeding four acres in demensions, without cost to the state or any county or municipality thereof for rent or lease, and also the real and personal property of library associations, used for library purposes where no dividends are declared, and to which the children attending the public schools have free access; and all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes."

The appellant urges that there can be no exemption here under section 4251 of the Code of 1906, as this statute was construed in the case of *Ridgeley Lodge v. Redus*, *supra*, in which the court said in substance that under the facts in that case the exemption could not be maintained as the property was used for profit and not for charity, and that even though the income from the property be used for charity, yet under the statute, section 4251, Code of 1906, the exemption could not be sustained. We agree with counsel for appellant that under section

4251, Code of 1906, the appellee could not maintain exemption from taxation of the property here in question, but we think that the appellee may safely rely upon section 4252, Code 1906, to sustain its contention that the property in this case is exempt from taxation in this state. Counsel for appellant urges that there is a conflict between sections 4251 and 4252, and that this conflict cannot be reconciled and that the two sections cannot be read harmoniously together, and that section 4252 repeals section 4251.

In this we disagree with the learned counsel for the appellant, as it is clear that section 4252, Code of 1906, does not conflict with nor curtail the exemption given in 4251, but simply extends the exemption so as to apply to property owned by religious societies when not used exclusively for the purposes of the society but producing revenue, provided the revenue is used for benevolent purposes and not for profit. We concede that statutes exempting persons and property from taxation must be strictly construed, but it is also true that there is a relaxation of the rule in the case of statutes of exemption applicable to religious and educational institutions, and that the supreme test is in the intent of the legislature. In *State v. Fisk University*, 87 Tenn. 241, 10 S. W. 286, the court holds:

"The intention of the legislature must govern in ascertaining the extent of tax exemptions, and when the exemption is to religious, scientific, literary, and educational institutions, the same strict construction will not be indulged in that would be applied to corporations created for private gain or profit."

In *Holly Springs v. Marshall County*, 104 Miss. 761, 61 So. 703, Justice Reed said:

"In construing statutes, we must look to the intention of the legislature, the spirit of the law, and the policy and purpose of the same."

It is well-settled law in construing statutes that the letter must yield to the spirit and intent of the act, and

where there is a conflict the intent will control the construction. The latter part of section 4252, Code of 1906, which reads as follows:

“And all the property, real and personal, and the revenue derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system where no dividends are declared and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county, and municipal taxes”

—When properly construed so as to obtain the intent of the legislature, clearly means that the revenue derived by any religious society used for benevolent purposes shall be declared exempt from taxation.

It is argued with considerable force by counsel for appellant that the conjunction “and” used between “fraternal” and “benevolent purposes” in the latter part of this act should be strictly construed, and means that, unless the revenue derived by the religious society here is used for *both* fraternal and benevolent purposes, the appellee cannot claim the exemption, and that the religious society here is not a fraternal or benevolent order on the lodge system. But we disagree with counsel in this construction, and we hold that, in order to obtain the policy and intent of the statute, the disjunctive “or” should be used and read into the act in the place of the conjunctive “and,” conjoining “fraternal and benevolent purposes” referred to in the last part of this provision of section 4252. If this was not the intent of the legislature that the revenues derived by religious societies and used for benevolent purposes should not be exempt, why the absurdity of mentioning “any religious or charitable society” in the act at all? And to hold that the contention of the appellant is correct would be to read entirely out of section 4252 any benefit whatever “to any religious or charitable society,” and would limit the benefit to a benevolent and fraternal order on the lodge system alone. We think that such a

construction of this statute is not justified by its terms. It is held that:

"Whenever necessary to effectuate the obvious meaning of the legislature, conjunctive words may be construed as disjunctive, and *vice versa*." 36 Cyc. 1123, and cases cited.

This seems to be the settled rule. *People v. Rice*, 138 N. Y. 151, 33 N. E. 846; *Eisfeld v. Kenworthy*, 50 Iowa, 389; *Collins Granite Co. v. Devereux*, 72 Me. 422; *Williams v. Poor*, 65 Iowa, 410, 21 N. W. 753; *Price v. Forrest*, 54 N. J. Eq. 669, 35 Atl. 1075; *Bates' Ann. St. Ohio* 1904, sections 4947, 6794; *Rev. St. Wyo.* 1889, section 2724.

The judgment of the lower court is affirmed.

Affirmed.

DICKERSON ET AL. v. YAZOO & MISSISSIPPI VALLEY RAILWAY COMPANY.

[71 South. 312.]

RAILROADS. *Injuries to stock. Case for jury.*

Where several mules were killed by the running train of a railroad company, and the engineer testified that when killed the mules were all in a bunch, but the evidence showed that they were killed several hundred yards apart, the matter of liability should have been left for the jury.

APPEAL from the circuit court of Washington county.
HON. F. E. EVERETT, Judge.

Suit by Ezra Dickerson and another against the Yazoo & Mississippi Valley Railroad Company. From a judgment for defendant on a peremptory instruction, the plaintiff appeals.

The facts are fully stated in the opinion of the court.

Wynn, Wasson & Wynn, for appellant.

Mayes, Wells, May & Sanders, for appellee.

SMITH, C. J., delivered the opinion of the court.

Appellants instituted this suit in the court below to recover of appellee damages for the killing of five mules and one horse owned by them. At the close of the evidence the jury were instructed to find for appellee, and there was a verdict and judgment accordingly. The evidence introduced in behalf of appellants made out a statutory *prima facie* case, and was to the effect that at about twelve o'clock on the night of October 8, 1913, at Marathon, a station on appellee's road, a gentleman living at that station was awakened by a noise, the nature of which does not appear, and upon going out to ascertain its cause he observed one of appellee's passenger trains passing going south, and that it stopped at a trestle a short distance south of the station, remaining there, however, only a few minutes, after which it proceeded on its journey. He then discovered appellants' mules and horse dead upon the track, having apparently been killed by the passing train. One of the mules was lying north of the station, another mule and a horse were lying one hundred and thirty-three yards south of the first mule, and the other three mules were lying at different places further south, the last being three hundred and eighty-eight yards south of where the first mule was found. Other witnesses testified to tracks of mules going south on the railroad beginning two hundred and sixty yards north of where the first mule was killed, and from the way the gravel was kicked up the mules making the tracks appeared to have been running. The driver of the engine pulling appellee's train on the occasion in question testified that he was running at the time between fifty and sixty miles an hour, and that he could not bring the train to a stop at

that speed within a distance of less than fifteen hundred or sixteen hundred feet; that he did not see the mules until too late to prevent striking them, and that as soon as he saw them he shut off the steam and applied the air brakes; that when he struck the animals, they were not scattered along the track, as testified to by witnesses for appellant, but they were "all huddled up together" in a space not larger than the courthouse in which the case was then being tried.

The evidence of this engineer seems not to be in accord with the physical facts testified to by the witnesses for appellant, so that the case is of the type illustrated by *Scott v. Railroad Co.*, 72 Miss. 37, 16 So. 205, from which it follows that the peremptory instruction should not have been given.

Reversed and remanded.

INDEX.

ABATEMENT AND REVIVAL.

1. *Other action pending. Dismissal. Effect. Plea.*

While at the common law the rule was to sustain a plea in abatement of another suit pending, if it was true at the time the plea was filed, but the tendency of the later cases and a preponderance of authorities sustain the doctrine, that it is a good answer to the plea of pendency of a prior action for the same cause, that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled, unless the prior suit is pending at the time of the trial of the second. *Grenada Bank v. Bourke*, 342.

2. *Plea.*

Pleas in abatement on the ground of the pendency of another suit for the same cause of action are not favored by our courts. *Id.*

ACTS CITED AND CONSTRUED.

Acts 1890, sec. 111. Carriers. Passenger accommodations. White and negro passengers. Sufficiency. Action. Instructions. Trial. Argument of counsel. *O'Leary v. Railroad*, 46.

ACTIONS—RIGHT AND CAUSE.

1. *Limitation of action. Exceptions. Dismissal of actions. New action. Misjoinder. Dismissal. Jurisdiction. Matters of form. Duly commenced.*

Where an action duly commenced within the time allowed, is dismissed for want of jurisdiction, under Code 1906, section 3116, so providing, the plaintiff may commence a new action for the same cause at any time within one year after such dismissal and where the commencement of the new action was more than six years after the accrual of the original cause but within one year of the time of the dismissal of the first action, a demurrer to a replication to the plea of the statute of limitations, setting up that the action was begun within one year after dismissal of the former suit should not be sustained. *Hawkins v. Ins. Co.*, 23.

2. *Limitation of actions. Exceptions. New action.*

Code 1906, section 3116, permitting the bringing of the actions within one year after dismissal of a cause for matters not affecting the merits, applies when the suit dismissed embraced the

ACTIONS—RIGHT AND CAUSE—Continued.

cause of action sued on in the second, even though it also embraced other and distinct causes of action asserted against parties other than the defendant in the second suit. *Ib.*

3. *Death. Actions for wrongful death. Number of actions.*

Under Laws 1898, chapter 65, providing that in actions for wrongful death, there shall be but one suit for the same death, which shall inure to the benefit of all parties concerned, it is immaterial that a child of deceased was not born when suit by her mother was instituted, since the limitation on the number of suits is without exception in favor of any person whatever. *Railroad v. Bradley*, 152.

4. *Actions for wrongful death. Number of actions. Good faith.*

Even conceding that a former judgment in order to constitute a bar to another suit must have been rendered in good faith, and without collusion, yet where there is nothing in the declaration in the last suit which indicates collusion in the rendition of the first judgment, the mere fact that it was rendered on the same day that the declaration was filed is insufficient for that purpose. *Ib.*

5. *Constitutional law. Invalidity of statutes.*

One who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality. A railroad company classified for the lowest privilege tax imposed by Laws 1912, chapter 102, cannot complain that the act authorized the railroad commission to consider the "gross earnings" of each railroad in classifying it for taxation and thus worked a burden upon interstate commerce, since such "gross earnings" are construed to refer only to intrastate business. *M. & C. R. Co. v. State*, 290.

6. *Trespass. Action for damages. Sufficiency of complaint.*

A declaration alleging that pursuant to a contract between plaintiff and defendant a lumber company, the defendant in 1911 cut timber amounting to fifty-three thousand feet and in 1912, to the amount of ten thousand feet and owed a balance thereon of thirty-eight dollars and sixty-two cents; that plaintiff notified defendant that he would expect rent for a mill site after 1911, for the first eight months of 1912 at ten dollars a month and after that at twenty dollars a month; that after notice the defendant kept trespassing on plaintiff's land, and asking damages for a wilful trespass, with an itemized statement of indebtedness annexed thereto and asking judgment on the amount thereof, stated a good cause of action. *Jayne v. Nash Lumber Co.* 841.

See EQUITY.

ADVERSE POSSESSION—APPEAL AND ERROR.

ADVERSE POSSESSION.

See POSSESSION.

AFFIDAVITS.

Sunday. Date. Validity.

An affidavit of a third person claiming property levied upon under execution, is valid though dated on Sunday, if in fact it was not made on that day. *Farrand Co. v. Huston*, 40.

See JUSTICE OF THE PEACE.

AMENDMENTS.

Indictment and information. Right of make..

Where an indictment under Laws 1908, chapter 115, making it an offense to sell intoxicating or spirituous liquors, charged that accused did sell "spirituous and intoxicating" etc., it may be amended by the insertion of the word "liquors" after intoxicating under Code 1906, section 1426, allowing amendments to cure formal defects; since such a defect was a mere clerical error and could not prejudice accused in his defense. *Keys v. State*, 433.

APPEAL AND ERROR.

1. Records. Justice court. Substituted record. Effect.

Where on appeal by a defendant to the circuit court from a conviction in a justice of the peace court, it appeared that the justice record had been lost and the defendant was tried *de novo* in the circuit court on a substituted record prepared by the district attorney over defendant's protest, without conforming to the statutory procedure for supplying lost records. In such case a conviction on appeal will be reversed. *Ellis v. State*, 1.

2. Carriers. Passenger accommodations. White and negro passengers. Sufficiency. Action. Instructions. Trial. Argument of counsel.

The statute law of Louisiana (Act No. 111 of 1890), requiring separate accommodations for white and negro passengers on railroad trains, applies to intrastate passengers and it was error to give an instruction on the statute, in an action by a passenger on an interstate state train for being forcibly deprived of his seat in a comfortable car to accommodate a negro excursion and to ride in the caboose. *O'Leary v. Railroad*, 46.

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

3. *Municipal corporations. Vacating streets. Bill of exceptions. Statu.es.*

Under Code 1906, section 80, giving a right of appeal to any person aggrieved by a city's action, and requiring that the bill of exceptions embodying the facts, if duly presented, shall be signed by the presiding officer of the acting board or of the municipal authorities. Where in proceedings to close an alley objections were filed, and upon issuance by the city authorities of an order closing the alley, the objector presented to the mayor and commissioners a bill of exceptions, which although the mayor approved it as correct, he, under the advice of counsel, refused to sign, unless compelled by mandamus. In such case the appeal to the circuit court was properly perfected, section 80, providing a summary proceeding for appeals of this character, even investing the circuit court with jurisdiction of the whole record, the actual consent of the mayor to the correctness of the bill being sufficient to perfect the appeal, there being no time prescribed by section 80 within which an appeal must be prosecuted, only that the party aggrieved should appeal "to the next term of the circuit court." In such case sections 83 and 95, Code 1906, have no application. *Polk v. City of Hattiesburg*, 80.

4. *Review. Questions first raised on appeal.*

Where complainant's bill to recover the amount bid by defendant at a trustee's sale foreclosing a deed of trust recited that the advertisement of sale was made according to law for three consecutive weeks, and the deed from the trustee contained the same recital, in such case complainant showed by his own pleading and proof that the sale was not advertised for thirty days as required by the deed of trust, so that such question was not raised for the first time on appeal. *Wilczinski v. Watson*, 86.

5. *Trial. Instruction.*

Where in an action for slander, plaintiff's declaration contained two counts and in the first count it was charged that the slanderous words were spoken by defendant's soliciting agent and in the second count the slanderous words are charged to have been spoken by defendant's superintendent, and the first count not being supported by the evidence, the court instructed the jury to find for the defendant on that count, it was error for the court to then instruct the jury that if they believed from the evidence that both said agents or either of them while acting within the scope of their authority and while about their master's business, spoke of and to the plaintiff the slanderous

 APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

words alleged in the declaration, then they should find for the plaintiff and assess his damages etc. *Life & Acc. Ins. Co. v. De Vance*, 196.

6. *Grounds of error. Waiver. Railroads. Privilege tax. Right to impose. Assessments. Classification. Commerce. Burden upon. Constitutional law. Legislature. Delegation of power. Invalidity of statutes. Due process of law. Equal protection of law.*

On appeal from an order overruling a demurrer, the grounds not argued will be considered waived. *Railroad v. State*, 290.

7. *Circuit court. Jurisdiction.*

Where plaintiff in the circuit court sued on an account consisting of two items, one for one hundred and eighty-nine dollars and eight cents, and one for one hundred dollars, but introduced evidence on only the item for one hundred and eighty-nine dollars and eight cents the supreme court on appeal will presume that this item was the only amount in controversy and that hence the circuit court was without jurisdiction. *Moore v. American Surety Co.*, 322.

8. *Criminal law. Presumptions.*

In the absence of an affirmative showing to the contrary, it will be presumed on appeal that the jury in a criminal trial was sworn. *McFarland v. State*, 482.

9. *Presentation for review. Assignment of error. Briefs. Suggestion of error. Issues as to cost. Parties.*

Where a question is not raised by assignment of error nor mentioned in brief of appellant, it need not be considered by the supreme court on appeal. *McCaleb v. McCaleb*, 480.

10. *Suggestion of error. Issue as to cost. Parties.*

Where, on suggestion of error after affirmance of a judgment providing that fees paid out of the county treasury to persons summoned as jurors should be taxed as cost in the cause, the only question presented is as to the taxation of such cost, and it appears that the controversy is between appellants and the county, and that appellees are not interested therein, the mandate will be withheld and the cause retained so that appellants may file an assignment of error raising such point and a copy thereof served on the attorney-general, and time will then be given to file briefs. *Id.*

11. *Harmless error. Instructions.*

Even though instructions given plaintiff and defendant are conflicting, if such instructions are more liberal to the party complaining than he was entitled to, it was harmless error. *American Ins. Co. v. Crawford*, 493.

APPEAL AND ERROR.

APPEAL AND ERROR—Continued.

12. *Harmless error. Instructions.*

When a fact is admitted an erroneous instruction as to the burden of proof in establishing such fact was harmless. *Id.*

13. *Objections below. Necessity.*

Where a depositor, in an action against a bank for the amount of an alleged forged check which was charged against his account, did not as required by Code 1906, section 1974, verify his replication by affidavit denying that he signed the check, the bank cannot on appeal complain of the receipt of testimony on this point when it made no specific objection on this ground in the court below to such evidence. *Collins v. Union & Farmers' Bank*, 506.

14. *Habeas corpus. Remedy by appeal. Right to relief.*

A writ of *habeas corpus* cannot successfully be invoked on the ground that a verdict in a felony case was taken in the absence of the trial judge, where the judgment was entered by the clerk and was in all respects regular on its face, since the taking of the verdict was a mere irregularity which could have been corrected by motion and appeal in the trial court that convicted petitioner. *State v. Boyd*, 565.

15. *Homicide. Evidence. Necessity of objections.*

Where no specific objection was made in the lower court to the testimony in regard to a dying declaration, such objection cannot be made for the first time on appeal in the supreme court. *Echols v. State*, 577.

16. *Questions. Reviewable. Questions raised in trial court. Jurisdiction. Estoppel.*

Where a cause, is not one strictly of equity cognizance, but still under section 147 of our Constitution, it was within the power of the court below to hear and determine it. In such case the question of jurisdiction, in order to be availed of in the supreme court should have been distinctly raised and insisted on in the court below. *Compress & Storage Co. v. Railroad Co.*, 602.

17. *Jurisdiction. Estoppel.*

Where defendants in the chancery court not only did not insist on an objection to the jurisdiction of the court, but by filing cross-bill themselves submitted the whole matter in controversy to the court for adjudication, they were thereby on appeal estopped from questioning its power so to do. *Id.*

18. *Review. Findings.*

The findings of a chancellor, in a suit to enjoin an action for damages from the maintenance of a logging road, that the owner

ASSAULT.

APPEAL AND ERROR—Continued.

of land was not damaged is not conclusive, on appeal, since the owner of the land is entitled to compensation for the use of the right of way over the land in addition to damages done in digging the ditches through his lands, field and crops. *Rice v. Lumber Co.*, 607.

19. *Supersedeas bond. Statute. Construction.*

Under Code 1906, section 1022, providing that "when a bond, recognition, obligation, or undertaking of any kind shall be executed in any legal proceeding, or for the performance of any public contract, or for the faithful discharge of any duty, it shall inure to the person to whom it is designed by law as a security, and be subject to judgment in his favor, no matter to whom it is made payable, nor what is its amount, nor how it is conditioned, and the persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had the effect in such proceeding or matter which a bond or other undertakings payable and conditioned as prescribed by law, would have had, and where any such bond or undertaking is not for any specified sum, it shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given," where a *supersedeas* bond is for a lesser or greater amount than that prescribed by law, the court is not authorized to render judgment for any amount which might have been required, but shall only render judgment for such amount as is authorized by the terms of the bond and rules of equity. *Parsons-May-Oberschmidt v. Furr*, 795.

ASSAULT.

With intent to kill. Self defense. Corroborative evidence.

Where in a prosecution for assault and battery with intent to kill the theory of the defense, established by his evidence, was that the person assaulted was the aggressor and that defendant acted throughout in necessary self-defense, and accused testified that when the party assaulted advanced upon him, his wife who was present, cried "Don't Charlie; don't do that!" there being evidence that Charlie was the injured man's name. In such case it was error to exclude the testimony of another witness who was about two hundred yards distant, from the fight, that he heard the injured man's wife cry "Don't Charlie, Don't." *Davis v. State*, 751.

ASSIGNEE AND ASSIGNOR.

Set-off and counterclaims. Rights of assignee. Statute.

Under our anti-commercial statute, Code 1906, section 4001, providing that all notes and other writings for the payment of money or other thing may be assigned by indorsement, and the assignee may maintain such action thereon in his own name as the assignor might have maintained and that in all actions on such writings defendant shall be allowed the benefit of all set-offs had against them previous to notice of assignment, where plaintiff railroad, in course of purchasing lumber under contract which required the seller to pay the freight to points on its line, had paid freight charges for the seller amounting to one thousand eight hundred and ninety-four dollars, and which owed the seller the purchase price of lumber amounting to two thousand nine hundred dollars; in such case the railroad, as against a bank standing in the position of an assignee of the invoices, after the seller's bankruptcy was entitled to set off such freight advances against the invoices since the bank at all times stood in the shoes of the seller. *Railroad Co. v. McComb City*, 676.

ASSIGNMENTS.

1. *For benefit of creditors. Partial assignment. Concealing assets. Validity. Preferring creditors.*

Under the facts as set out in this case the court held that there was no evidence supporting the charge that the assignment was fraudulent and that the assignment was not a general assignment but a valid partial assignment and that the property of the debtor not embraced in the assignment was not "trifling in amount" or value. *Bradberry v. State Revenue Agent*, 581.

2. *For benefit of creditors. Preferring creditors first.*

A debtor has a perfect right to pay his general creditors first. *Id.*

ATTORNEYS.

See VENDOR AND PURCHASER.

ATTORNEY AND CLIENT.

Suit for fee. Decree.

Where two attorneys had recovered judgment for a client against a lumber company and the sureties on its bond of which judgment they were entitled to a part as attorney fees, and the lumber company paid the amount of the judgment to a bank and said bank pa'd over to one of the attorneys, D all of the other at-

BAIL—BANKRUPTCY.

ATTORNEY AND CLIENT—Continued.

torney M's part of such judgment except three hundred dollars which money so paid said attorney remitted to his associate M. The bank claimed that the attorney D owned it three hundred dollars and, with the consent of D, credited this amount upon the debt owing it by D, who thereupon marked the judgment satisfied of record. In such case where the attorney M sued his associate and the lumber company and the bank for the three hundred dollars not paid him, he could only recover against the bank which was in possession of the money. *Bank of Collins v. Miller*, 871.

BAIL.***Bonds. Liability. Statutes.***

Under Code 1906, section 1466, providing that all bonds or recognizances, conditioned for the appearance of any party in any state case or criminal proceedings, which shall free such party from jail, shall be valid, and under section 1467, providing that all bonds and recognizances in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer such offense, and shall be valid until he is discharged by the court, where defendant's principal was charged with feloniously and knowingly receiving stolen goods, while the bond bound him to appear and answer a charge of receiving stolen goods. In such case if the principal was released, the bond was effective, and the sureties could not escape liability on the ground that the offense described in the bond was different from that charged in the indictment. *Allen v. State*, 384.

BANKRUPTCY.***Effect on pending actions. Validity of judgment.***

Where a plaintiff recovered a judgment against defendant before a justice of the peace and defendant gave bond and appealed to the circuit court, and thereafter defendant was adjudged a bankrupt, but had not been granted a discharge before his case was brought to trial in the circuit court, and judgment was rendered against him and the sureties on his bond in that court, the bankruptcy court having authorized the plaintiff to proceed to judgment. In such case the circuit court had jurisdiction of the parties and the subject-matter, and its judgment was valid against the defendant and his sureties and a subsequent discharge in bankruptcy of defendant did not relieve his sureties. *Kohn, Weil & Co. v. Weinberg*, 275.

BANKS AND BANKING.

1. *Compromise and settlement. What constitutes. Effect. Appeal and error. Objections below. Necessity. Trial. Action for deposit. Instructions. Applicability to evidence. Demand.*

The receipt by a depositor of a check from a bank for a balance of sixty-five cents to which he was admittedly entitled, and which the bank sent with a notice closing his account on account of the small balance, does not work a settlement of the depositor's demand, for nine-hundred dollars for which he had already brought suit, claiming that the bank had wrongfully charged his account with a check for that amount, which check he claimed was a forgery. *Collins v. Union & Farmers' Bank*, 506.

2. *Appeal and error. Objections below. Necessity.*

Where a depositor, in an action against a bank for the amount of an alleged forged check which was charged against his account, did not as required by Code 1906, section 1974, verify his replication by affidavit denying that he signed the check, the bank cannot on appeal complain of the receipt of testimony on this point when it made no specific objection on this ground in the court below to such evidence. *Ib.*

3. *Trial. Action for deposit. Applicability to evidence.*

When a depositor sued a bank claiming that it improperly charged his account with a forged check, and the bank claimed that the check was genuine, an instruction that there could be no recovery if the depositor did not promptly notify the bank of the forgery, so that it might recover against its correspondent, was not warranted by the evidence where the depositor promptly notified the bank and assisted one of its officers in attempting to trace down the forgery, and especially since the bank contended that the check was signed by the depositor. *Ib.*

4. *Action by depositor. Demand.*

In such case, a written demand was not necessary for the payment of the amount of the forged check before suit, in view of the fact that the bank through its officials, had denied its liability for the amount, and had denied that the plaintiff had this amount on deposit. *Ib.*

5. *Collection of drafts. Trust. Insolvency.*

Code 1906, section 4852, providing that a bank or other person collecting a draft with a bill of lading attached shall retain the money so collected for the space of ninety-six hours after the delivery of the bill of lading, is intended merely to give the debtor or consignee sufficient time to investigate his purchase and if dissatisfied, to sue by attachment in the local courts, and in such

BASTARDS—BILLS AND NOTES.

BANKS AND BANKING—Continued.

case a bank collecting for the owner's drafts with bill of lading attached does not hold the money collected in trust so that a trust may, on the insolvency of the collecting bank be impressed upon its assets, but the owner of the drafts is a mere general creditor. *Nat. Bank v. Conner*, 653.

BASTARDS.

Proceedings. Bond for support. Acts of court in vacation.

Section 283, Code 1906, confers upon the circuit judge in vacation the power to discharge persons confined in jail for failure to give bond for the support of bastards, and this section is the full limit of his powers in the premises. The judge cannot in vacation commit a defendant in bastard proceedings to jail and for such commitment a writ of *habeas corpus* will lie. *Ex Parte Hillman*, 207.

BILLS AND NOTES.

1. *Assignment. Notice.*

Where the maker gave his note to a bank of which he was a director and the bank assigned the note to a third party and the director when making a payment upon the note to the cashier was told that it was not in the bank, he could not claim that he made the payment to his bank without notice of the assignment, since being put upon inquiry and able to ascertain the true facts he was chargeable with notice that his note had been assigned. *First Nat. Bank v. Dean*, 214.

2. *Trial. Instructions. Ignoring defenses. Extending time of payment. Surety. Release.*

An agreement by the payee of a note to extend for a definite period the time of payment, in consideration of the promise of the principal debtor to pay interest on the debt during such extension, constitutes a binding contract of forbearance, and will operate to discharge a surety who does not consent to the extension, and an instruction which eliminates from the consideration of the jury such defense by the surety should not be given. *Harrison v. Garner*, 586.

3. *Corporations. Accommodation notes. Innocent purchaser. Liability. President executing notes. Authority. Presumption.*

Where a corporation is empowered by its charter to execute promissory notes generally, but not to make accommodation paper, it is liable on an accommodation note executed by it to one purchasing such notes in due course of business for value, without notice. *Real Estate Co. v. First Nat. Bank*, 620.

BILLS OF LADING—CARRIERS.

BILLS AND NOTES—Continued.

4. *Validity. Fraud.*

When the agent of plaintiff acting in good faith promised the defendant further credit and an extension of time, in order to secure their signatures to notes for a preexisting debt, the fact that plaintiff later refused to extend the credit promised was not such a fraud as invalidated the notes. *Moore D. G. Co., v. Ainsworth*. 705.

5. *Same.*

In such case the failure of the plaintiff to allow further credit was but a partial failure of consideration and defense to an action on the notes only in the nature of a set-off to the extent of actual loss caused by the failure of plaintiff to carry out the obligation to extend further credit. *Id.*

BILLS OF LADING.

See LIABILITY.

BRIEFS.

Appeal and error. Presentation for review. Assignment of error. Suggestion of error. Issues as to cost. Parties.

Where a question is not raised by assignment of error nor mentioned in brief of appellant, it need not be considered by the supreme court on appeal. *McCaleb v. McCaleb*, 486.

BROKERS.

Purchasers.

Where appellant sued, by attachment in chancery for breach of contract to convey him certain land, and demanded a decree for the difference between the price he claimed he contracted to pay appellee, and the price at which he had entered into a contract to resell it to third parties, the court held that under the facts as shown in the opinion of the court appellant was a purchaser and not an agent and was entitled to recover the amount sued for. *Holloman v. Lindsey*, 364.

CARRIERS.

1. *Passenger accommodation. White and negro passengers. Sufficiency. Action. Instructions. Trial. Argument of counsel.*

The statute law of Louisiana (Act No. 111 of 1890), requiring separate accommodations for white and negro passengers on railroad trains, applies to intrastate passengers and it was error to give an instruction on the statute, in an action by a passenger on an interstate train for being forcibly deprived of his seat in a comfortable car to accommodate a negro excursion and to ride in the caboose. *O'Leary v. Railroad*, 46.

CARRIERS.

CARRIERS—Continued.

2. *Carriage of passengers. Schedules. Duty of carrier's officers. Ejection. Trial. Instructions. Refusal.*

A railroad company has the right to so arrange its schedules that some of its trains will not stop at all of its stations, and in the absence of a special contract to the contrary is ordinarily under no obligation to stop its trains and discharge passengers at a station at which the train is not regularly scheduled to stop. *Railroad v. Walls*, 256.

3. *Carriage of passengers. Duty of carrier's officers.*

While it is true that the holder of a railroad ticket should inquire before embarking upon a train whether it will stop at the place to which he has purchased his ticket, nevertheless, the servants of a railroad company are not relieved of all duty in this connection toward a passenger who has mistakenly embarked upon a train not scheduled to stop at the place to which he has purchased a ticket. They should inform him of that fact upon their discovery thereof, so that he may disembark at a regular stop, if any, before reaching his destination and continue his journey on another train. *Ib.*

4. *Same.*

✓ If the employees of the company negligently fail to discharge this duty to such a passenger, they have no right thereafter to deal with him in such a manner as to impose undue inconvenience and discomfort upon him in reaching his destination. They have no right to eject him from the train between stations, on a dark and rainy night, at a place with which he is not familiar, even though he fails to pay his fare to the next regular stop. *Ib.*

5. *Injury to passengers. Directing verdict. Evidence. Injury to others. Manner of injury. Opinions. Electricity.*

Where, under the evidence, it was a question for the jury as to whether plaintiff, a passenger, received a shock on the burning off of the last of four wires carrying the current in a street car of defendant, the other three wires having previously broken, and where it was impossible to say as a matter of law that no inference of negligence was to be drawn from the absence of inspection of such wires for several months before the accident, it was error to give a peremptory instruction for the defendant, since under Laws 1912, chapter 215, the receiving of an injury from the running of a car was *prima facie* evidence of negligence on the part of the carrier. *Hill v. Light & Traction Co.* 388.

CARRIERS—Continued.

6. *Passengers. Evidence. Injury to others.*

Evidence of other shocks received by other passengers on other occasions while riding in the car in which plaintiff was a passenger at the time of her injury were admissible. *Id.*

7. *False bills of lading. Telegram. Liability. Estoppel.*

Under the facts in this case the sending of the telegram at the request of the shipper's agent for his accommodation by defendant's agent who was familiar with the methods by which export shipments of cotton were handled, and who knew or should have known, that the telegram was intended for the use of the purchaser of the exchange in selling it, or in disposing of the ladings, did not estop the defendant from disputing the fact that the bills of lading purchased by plaintiff were false, since the statement in the telegram was true, and its agent might presume good faith on the part of its shippers, and that no false and forged bills of lading would be offered for sale by the shipper. *New York v. Railroad Co.*, 514.

8. *Carriage of live stock. Evidence.*

Proof that cattle were shipped in good condition when they started and that on arrival at destination one was found dead and another so badly injured that it died shortly afterwards will not alone establish negligence on the part of the carrier. *Ill. Cent. R. Co. v. Peel*, 712.

9. *Carriage of passengers. Special trains.*

While a railroad company had for several years allowed passengers to board its excursion trains to the state fair at a flag station, it may change its rules and refuse to receive passengers on such special trains, except at its agency stations where tickets could be procured, and a plaintiff cannot complain that he was refused passage on such special train at a flag station, though the train had stopped when flagged at such a station. *Gulf & S. I. R. Co. v. Dixon*, 800.

CIRCUIT COURT.

See JURISDICTION.

CHATTEL MORTGAGE.

1. *Payment and satisfaction. Nonpayment of unsecured debt.*

Under Code 1906, section 2781, providing that mortgagees or *cestui que trust* shall satisfy mortgages or deed of trust of record when the same has been fully paid, even though a creditor whose debt was secured by a deed of trust on crops raised by the mortgagor on rented lands, was liable for the rent, where the deed of trust

CODES CITED AND CONSTRUED—Continued.

- § 1466 (1906). Bail. Bonds. Liability. Statutes. *Allen v. State*, 384.
- § 1561 (1906). Peace bond. Statutes. Effect of appeal bond. Breach of the peace. *City of Jackson v. Belew*, 243.
- § 1959 (1906). Public lands. Title. Prima facie title. *Halloway v. Miles*, 532.
- §§ 1960, 1961 (1906). Evidence. Secondary evidence. Public lands. Title. Prima facie title. *Ib.*
- § 1974 (1906). Appeal and error. Objections below. Necessity. *Collins v. Union & Farmers' Bank*, 506.
- § 2139 (1906). Exemption. Wages of laborer. *Lewis v. Harrison*, 844.
- § 2681 (1906). Courts. Jurisdiction. Amount in controversy. Interest. Payment. *Best v. Pitts*, 541.
- § 2772 (1906). Mortgages. Foreclosure by sale. Defective notice. Statute. Appeal and error. Review. Questions first raised on appeal. *Wilczinski v. Watson*, 86.
- § 2781 (1906). Chattel mortgage. Payment and satisfaction. Non-payment of unsecured debt. *Coon v. Robinson Mercantile Co.*, 700.
- § 3074 (1906). Statutes. Amendment. Reference to title. Constitutionality. *Seay v. Plumbing & Metal Co.*, 834.
- § 3116 (1906). Limitation of actions. Exceptions. Dismissal of actions. New Action. Misjoinder. Dismissal. Jurisdiction. Matters of form. Duly commenced. *Hawkins v. Ins. Co.*, 23.
- § 3122 (1906). Remainder. Action. Limitations. Running of statute. Remaindermen. Infants. Property. Sale. Power of court. Limitations of actions. *Clark v. Foster*, 543.
- § 3185 (1906). Vender and purchaser. Bona-fide purchaser. Notice. Records destroyed by fire. *Myers v. Viverett*, 334.
- § 4001 (1906). Set-off and counterclaims. Rights of assignee. Statute. *Railroad Co. v. McComb City*, 676.
- § 4186 (1906). Elections. Contests. Remedies. *Loposser v. State ex rel.*, 240.
- § 4233 (1906). Replevin. Verdict. Form. Restoration of property. Statutes. *Miller v. Griffin*, 535.
- § 4251 (1906). Taxation. Exemptions. Charitable societies. Construction of statutes. *Adams Co. v. Diocese of Natchez*, 890.
- § 4312 (1906). Taxation. Assessment. Reduction. Proceedings. Personal property. To whom accessible. *Adams v. Dale*, 671.
- §§ 4332, 4367 (1906). Taxation. Action to confirm tax title. Pleading. Cure. Statutes. *Central Trust Co. v. Haynes*, 119.
- §§ 4433, 4469 (1906). Highways. Road taxes. Dispositions. *Waveland v. Hancock County*, 471.
- § 4512 (1906). Schools and school districts. County school boards. Meetings. Statutory provisions. Consolidated districts. School taxes. Enjoining collection. *Purvis v. Robinson*, 64.

 COMPROMISE AND SETTLEMENT—CONSTITUTION.

CODES CITED AND CONSTRUED—Continued.

- § 4784 (1906). Receivers. Assets. Claims of third persons. *Hardware Co. v. Harvester Co.*, 783.
- § 4852 (1906). Banks and banking. Collection of drafts. Trusts. Insolvency. *Nat. Bank v. Conner*, 653.
- § 4992 (1906). Execution. Claims of third persons. Affidavit. Issues. Date. Sunday. Validity. Principal and agent. Ratification. *Farrand Co. v. Huston*, 40.
- § 4998 (1906). Execution. Claims by third person. Venue. Statutory provisions. *Croom v. Williams*, 605.
- § 5058 (1906). Vagrancy. Sentence. Excessive sentence. *Daniels v. State*, 440.
- § 5078 (1906). Wills. Validity. Holographic. Incorporation. *Hewes v. Hewes*, 826.

COMPROMISE AND SETTLEMENT.

What constitutes. Effect. Appeal and error. Objections below. Necessity. Trial. Action for deposit. Instructions. Applicability to evidence. Banks and banking. Demand.

The receipt by a depositor of a check from a bank for a balance of sixty-five cents to which he was admittedly entitled, and which the bank sent with a notice closing his account on account of the small balance, does not work a settlement of the depositor's demand, for nine hundred dollars for which he had already brought suit, claiming that the bank had wrongfully charged his account with a check for that amount, which check he claimed was a forgery. *Collins v. Union & Farmers' Bank*, 506.

CONFLICT OF LAWS.

Torts. Actions. What law governs. Damages. Punitive damages.

The law of the state where a tort occurs governs the right of action. *Telegraph Co. v. Jennings*, 673.

CONSTITUTION 1890.

- § 17. Eminent domain. Compensation. Actual damages. *Williams v. Light & Ry. Co.*, 174.
- § 97. Death. Actions for wrongful death. Limitations. *Railroad v. Bradley*, 152.
- § 104. Adverse possession. Claim against the state. Void tax deed. Statutes. *Hewling v. Blake*, 225.

CONSTITUTION CITED AND CONSTRUED.

- § 112. Taxation. Assessment. Validity of statute. *Horton v. King*, 859.

CONSTITUTION CITED AND CONSTRUED—Continued.

- § 147. Appeal and error. Questions. Reviewable. Questions raised in trial court. Jurisdiction. Estoppel. *Compress & Storage Co. v. Railroad Co.*, 602.
- § 193. Defective appliances. Constitutional provisions. *Gulf & S. I. R. Co. v. Dana*, 666.

CONSTITUTIONAL LAW.

1. *Legislature. Delegation of power.*

While the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend, and so it may delegate to a railroad commission, the right to determine questions of fact; such as, whether a railroad falls within a given class for purpose of license taxes under Laws 1912, chapter 102. *M. & C. R. Co. v. State*, 290.

2. *Invalidity of statutes.*

One who is not prejudiced by the enforcement of an act of the legislature cannot question its constitutionality. A railroad company classified for the lowest privilege tax imposed by Laws 1912, chapter 102, cannot complain that the act authorized the railroad commission to consider the "gross earnings" of each railroad in classifying it for taxation and thus worked a burden upon interstate commerce, since such "gross earnings" are construed to refer only to intrastate business. *Id.*

3. *Railroads. Taxation. Due process of law.*

The state having power to impose license taxes, and Laws 1912, chapter 102, not working any burden on interstate commerce, such act cannot be held invalid under Constitution, U. S. Amend. 14, as depriving railroads, which also run into other states, of their property without due process of law, or denying them equal protection of the laws, on the theory that in classifying such roads for taxation their interstate earnings can be considered *Id.*

4. *Statutes. Amendment. Reference to title. Constitutionality.*

Laws 1912, chapter 232, entitled "An act to amend and enlarge section 3074, Code 1906, and to extend and enlarge the provisions of same, so as to provide more effective liens for sub-contractors, laborers and other employed," section 1 being headed "Liens of Laborers and Subcontractors Extended"—Code amended utterly fails to comply with section 61 of the constitution of the state, which reads: "No law shall be revived or amended by reference to its title only, but the section or sections, as amended

CONTRACTS.

CONSTITUTIONAL LAW—Continued.

or revived shall be inserted at length." This act is unconstitutional because it fails to insert at length, in chapter 232, section 3074 of the Code of 1906, as amended. *Seay v. Plumbing & Metal Co.*, 834.

CONTRACTS.

1. *Shipping. Demurrage. Construction of charter party.*

Where in an action to recover demurrage paid to the master of a vessel for delay in loading lumber, it was shown that plaintiff entered into a written contract with defendant by the terms of which plaintiff was to sell and deliver to defendant a cargo of lumber "f. o. b., pier Gulfport, for November loading" and defendant requested that loading be delayed until December to which plaintiff replied, that it would be inconvenient, and that it could not agree to load in December, but afterwards received a copy of the charter party, and arranged a berth for the vessel with full knowledge of its provisions, plaintiff thereby acquiesced in the change of date and was bound by the charter party, so that it was not entitled to recover demurrage paid on account of delay in loading caused by the change. *Trading Co. v. Lumber Co.*, 31.

2. *Shipping. Demurrage. Delay in loading. Waiver by acceptance of cargo.*

A right of action for damages for breach of contract arises on the failure of the seller to deliver the goods as agreed on for a delay in delivery. In the case of a partial delivery an action for damages will live for the part not delivered, the acceptance of the partial deliveries being no waiver of the breach. *Id.*

3. *Master and servant. Independent contractors. Who are. Trial verdict. Sufficiency.*

Where a railroad company entered into a contract with a contractor for the execution and removal of dirt from one part of its right of way to another and it was provided in the contract that the railroad company's trains should have preference over those of the contractor, that the contractor's train crew should be such as were satisfactory to the railroad company's superintendent and required to pass such examination as he might prescribe, that any who were unsatisfactory, might be discharged, and that the contract should not be sublet save with the consent of the railroad company's chief engineer, and where the chief engineer consented to the subletting of part of the contract, and plaintiff, an employee of the railroad company, was directed to report to the contractor for service on one of his trains, and while so engaged, was injured through the negligence of a fire-

CONTRACTS—Continued.

man employed by the subcontractor over whom the principal contractor exercised no control. In such case the contractor was not liable for his injuries, the negligent servant being that of an independent contractor. *Callahan v. Rayburn*, 107.

4. *Same.*

An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Ib.*

5. *Master and servant. Independent contractor. Who are.*

As the railroad company had supervision over the employees of the subcontractor, such contractor was not as to it an independent contractor, and plaintiff could recover from the railroad company. *Ib.*

6. *Sales. Construction. Offer and acceptance.*

Where a contract is to be formed by means of an offer by one party and the acceptance thereof by the other, there must be an unconditional acceptance of the offer, not only must the acceptance be unconditional but it must be identical with the terms of the offer. It must not vary from the proposal, either by way of omission, addition, or alteration. If it does, neither party is bound. *Sutter-Van Horn Co. v. Telephone Co.*, 169.

7. *Brokers. Purchasers.*

Where appellant sued, by attachment in chancery for breach of contract to convey him certain land, and demanded a decree for the difference between the price he claimed he contracted to pay appellee, and the price at which he had entered into a contract to resell it to third parties, the court held that under the facts as shown in the opinion of the court appellant was a purchaser and not an agent and was entitled to recover the amount sued for. *Holloman v. Lindsey*, 364.

8. *Insurance. Fraternal association. Laws. Amendment. Construction. Assessments. Increase.*

A fraternal association or corporation, under the reserve power to amend its laws, whether the power be reserved in the constitution and laws or in the contract with its members, may so amend its law as to bind its members and affect their pre-existing contracts, provided the amendment be reasonable, does not impair vested rights, or radically alter its contracts with its members. *Newman v. Knights of Pythias*, 371.

9. *Insurance. Mutual association.*

It is well established under the rule that it is competent for parties to contract with reference to existing or future laws and that,

CONTRACTS.

CONTRACTS—Continued.

when application for membership in a mutual benefit association has been made, and a certificate of insurance from the association is issued to the applicant, the constitution, by-laws, application and certificate, all together, constitute the contract. *Ib.*

10. *Construction.*

In order to determine the true meaning of a contract, the facts must be kept in view and the contract, in its entirety, must be construed in accordance with established rules of law. *Ib.*

11. *Construction. Intent.*

If it appears by a contract that a party intends to bind himself, trivial inaccuracies will be disregarded and if the intention of the parties can be ascertained, courts will effectuate that intention. *Isler v. Isler*, 419.

12. *Insurance. Accident insurance. Right of assignees. Execution. Evidence.*

The assignee of a claim for damages under an accident insurance policy has no greater right and no superior claim than that possessed by the assignor. *Maryland Casualty Co. v. Grace*, 438.

13. *Insurance. Accident insurance. Execution. Evidence.*

Where the local agent of an accident insurance company mailed a policy to the insured, who refused to accept it or pay the premium but failed to return the policy, and notified the agent to cancel it and supposed the agent had done so, and there was no evidence that the premium had ever been paid to the company, in such case the company was not liable for a claim for damages to assured which was assigned by him after the expiration of the policy and upon which suit was brought by the assignee. *Ib.*

14. *Master and servant. Compensation.*

Where under the contract of service either party could terminate it at pleasure, a servant who only worked seven days in a month before he was discharged, can only recover for such time as he worked and not for the whole month. *Railroad Co. v. Monroe*, 550.

15. *Landlord and tenant. Turpentine leases. Actions. Evidence. Deficiency in leased lands. Recovery. Burden of proof. Timber leases. Construction.*

When the lessee of timber lands claimed that there was a deficiency of acreage under his contract, it had the burden of showing the amount of the shortage. *Lumber Co. v. Turpentine Co.*, 848.

16. *Landlord and tenant. Timber lease. Construction.*

Where defendant leased to complainant lands for the purpose of turpentineing, which were described as containing approximately six thousand, nine hundred and thirteen acres of timber and the

CONTRACTS.

CONTRACTS—Continued.

contract of lease recited that the lessee might box for turpentine purposes all merchantable pine timber, and that the term "merchantable pine timber" should mean any tree of sufficient size to square not less than four inches. In such case in view of other provisions for turpentine a fixed number of acres each year and for the location by the lessor of the lands to be turpented yearly, the lessor was not bound to furnish virgin timber of the acreage specified. *Id.*

17. *Landlord and Tenant. Timber leases. Construction. Deficiency.*

Under the facts in this case, the contract of lease was a contract in gross or in bulk, so that no recovery for shortage in the acreage of the timber could be maintained where the shortage did not amount to deception or fraud. *Id.*

18. *Statute of frauds. Agreements not to be performed within one year.*

Under the provisions of the statute of frauds, providing that contracts not to be performed within one year from the making thereof must be in writing, the possibility of the death of the promisor within one year would not take the contract out of the statute unless the death leaves the contract fully performed, the rule being, if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. *Edwards & Sons v. Farve*, 864.

19. *Statute of frauds. Agreements not to be performed within one year.*

In a suit on a contract for the delivery of ninety thousand logs at the rate of two hundred per day, an instruction that a suit cannot be maintained on an oral contract which was not to be performed within one year and if the jury believed that the logs could not be handled within one year at the rate of two hundred a day they shall find for the defendant, should not have been refused, as the contract was within the statute of frauds since the clause "not to be performed within one year from the making thereof" means to include any agreement which, by fair and reasonable interpretation of the term used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making. *Id.*

20. *Vendor and purchaser. Constitution. Term of payment. Waiver. Mortgages. Vendor's lien. Priority.*

Where complainant through her agent and attorney entered into a written contract for the sale of lands, agreeing in consideration of two hundred dollars to be paid in Jackson, Mississippi, free

CONVEYANCE—CORPORATIONS.

CONTRACTS—Continued.

from any exchange and the further consideration of one thousand dollars, to be paid in cash at Jackson free of any exchange, to convey the defendant a specified tract of land, and the contract provided that it should be sent to a bank and delivered to defendant when the first cash payment was sent to complainant at Jackson free of exchange, the deed to be made upon the same condition. New York Exchange for the first payment was sent to complainant and collected by her in the usual course of business and the contract delivered to the bank. Thereafter defendant borrowed from another a sum of money to make the last payment and gave a deed of trust on the land to secure the money, which money was deposited in a bank at the place where the deed was to be delivered, and that bank drew a draft on New York, which was delivered to complainant's agent, who sent it to complainant's agent at Jackson, but the draft was not paid because of the insolvency of the drawing bank. In such case under the terms of the contract, payment in cash at Jackson had to be made before defendant was entitled to a deed. *Mayer v. Coleman*, 875.

21. Vendor and purchaser. Terms of payment. Waiver.

In such case, the fact that complainant had previously accepted and collected New York Exchange for the first payment, and that her agent received a New York draft, did not show a waiver of her right to demand payment in cash at the place agreed upon, since it is a well settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the *prima facie* presumption arises that the check was taken merely as a conditional, not absolute, payment, and in case the check is not honored upon due presentation, the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor's liability on the check. *Ib.*

See LIABILITY.

CONVEYANCE.***Fraudulent. Sale in Bulk. Statutes.***

One purchasing in violation of the Bulk Sales Act (Laws 1908, chapter 100), acquires no right as against creditors of the seller. *Dean v. Bowles*, 575.

CORPORATIONS.**1. Bills and notes. Accommodation notes. Innocent purchaser. Liability. President executing notes. Authority. Presumption.**

Where a corporation is empowered by its charter to execute promissory notes generally, but not to make accommodation paper, it is

▲ CORPORATIONS—Continued.

liable on an accommodation note executed by it to one purchasing such notes in due course of business for value, without notice. *Real Estate Co. v. First Nat. Bank*, 620.

2. *President executing notes. Authority. Presumption.*

In a suit by a purchaser for value without notice of an accommodation note of a corporation, proof that the president of the corporation executed the note was *prima facie* evidence of his authority to bind the corporation in that manner. *Id.*

3. *Notice to corporation. Sufficiency of compliance.*

Under Code 1906, section 920, providing that process may be served on the agent of a foreign corporation within the county where suit is brought, regardless of the character of the agency, but requiring that the clerk, when return of the services is made, shall mail a copy of the process to the home office of the corporation by registered letter and file a certificate of such mailing, in the absence of which no judgment shall be valid, where summons was issued under the statute, but the clerk failed to mail the notice as required, a judgment by default against such corporation was erroneous there being no valid notice. *Household of Columbian v. Lundy*, 881.

COUNSEL.

See INSTRUCTIONS.

COUNTIES.

Board of supervisors. Unauthorized act. Liability. Pleading. Demurrer. Admission.

When the board of supervisors of a county entered an order requiring all live stock in the county to be vaccinated and appointed a person to vaccinate such stock, who over plaintiff's protest vaccinated a horse, which in consequence contracted lockjaw and died, in such case the county was not liable for such death, since the board of supervisors acted without authority and a county is not liable for the unauthorized acts of its board of supervisors. *Harrison County v. Marione*, 592.

COURTS.

Jurisdiction. Amount in controversy. Interest. Payment.

Under Code 1906, section 2681, so providing, payment made will be applied to accrued interest first in the absence of any agreement to the contrary, and the circuit court has jurisdiction of a suit upon a note for three hundred and twenty dollars when the accrued interest at the time of a payment of fifty dollars amounts to more than that amount. *Best v. Pitts*, 541.

COVENANTS—CREDITORS.

COVENANTS.

1. *Covenant against incumbrances. Breach. Liability. General covenants.*

Where a vendor sold land for a valuable consideration by a general warranty deed, the granting clause of which was "do hereby sell, convey and warrant" and further provided, "to have and to hold the same free from and against the legal claims of all persons whomsoever," which land had been previously assessed for taxes, and which was sold for taxes, and not redeemed within two years, where such tax lien had been unknown to the vendors and where the vendor, having notice of the tax sale in time to redeem, acted upon legal advice and failed to redeem, but in no way misled the vendor. In such case the vendee was entitled to recover of the vendor the consideration paid for the land. *Sisters of Perpetual Adoration v. June*, 612.

2. *General covenants.*

The warrantee, in a deed containing a general covenant must deal fairly and in fidelity to his warrantor. *Ib.*

3. *Breach. Payment of claim by covenantee.*

Where a vendor of land in his deed warranted against the legal claims of all persons, and the land at the time was subject to a paramount tax lien, the vendee might pay the tax or redeem the land from a tax sale and recover from the vendor the amount so paid, and a vendee in such case may buy in an outstanding title or incumbrance to protect his possession, but in so doing he acts at his peril in determining whether the outstanding title or incumbrances is valid, which right, however, is a mere privilege accorded him, and not a duty imposed by law. *Ib.*

CREDITORS.

1. *Assignment for benefit of. Partial assignment. Conceding assets. Validity. Preferring creditors.*

Under the facts as set out in this case the court held that there was no evidence supporting the charge that the assignment was fraudulent and that the assignment was not a general assignment but a valid partial assignment and that the property of the debtor not embraced in the assignment was not "trifling in amount" or value. *Bradberry v. State Revenue Agent*, 581.

2. *Assignment for benefit of. Preferring creditors first.*

A debtor has a perfect right to pay his general creditors first. *Ib.*

CRIMINAL LAW.

CRIMINAL LAW.

1. *Trial. Instructions.*

In a trial for assault with intent to commit rape an instruction that the strongest proof of the good reputation of the prosecutrix for virtue and chastity is the proof that no one had heard her reputation in this particular discussed before the alleged assault, was erroneous, because, besides being an instruction upon the weight of the evidence, the court treated the state's evidence as proof. *Welch v. State*, 147.

2. *Same.*

Such an instruction was further erroneous in assuming that no one had heard the reputation of the prosecutrix discussed in this particular, especially when a number of defendant's witnesses testified to the contrary. *Id.*

3. *Trial. Instructions.*

The refusal of an instruction for the defense that the jury should "not consider the physical defects of defendant as any evidence against him" was proper, since the jurors are presumed to be men of common sense and needed no instruction of this character. *Keys v. State*, 433.

4. *Trial. Examination of witnesses. Absence of accused.*

The examination of a witness in the absence of the defendant charged with a capital felony is reversible error. *Watkins v. State*, 438.

5. *Same.*

If it be conceded that section 1495, Code 1906, providing that in criminal cases the presence of the prisoner may be waived, is applicable to capital felonies, still it does not apply where the defendant did not know that a witness was going to be examined while he was out and his counsel were not aware of his absence from the court room. *Id.*

6. *Jury. Administering. Oaths. Record.*

Where in a murder case the minutes of the trial court recites that twelve jurors were sworn, but named only eleven and a second order in the case named twelve, but did not recite that they were sworn, in such case the record sufficiently showed that twelve jurors were chosen and sworn, the errors being manifestly clerical. *McFarland v. State*, 482.

7. *Appeal and Error. Presumptions.*

In the absence of an affirmative showing to the contrary, it will be presumed on appeal that the jury in a criminal trial was sworn. *Id.*

CRIMINAL LAW.

CRIMINAL LAW—Continued.

8. *Appeals. Venue. Judicial notice.*

On an appeal to the circuit court from a conviction of a misdemeanor by a justice of the peace, it is necessary for the state to show the venue of the offense, and where the only proof of venue was that the offense occurred within a named city it was insufficient, since the court cannot take judicial notice of what justice's court district a named city is in. The districts of a county being determined by order of the board of supervisors of the county, and by such order may be and are sometimes charged. *Elsey v. State*, 502.

9. *Reasonable doubts.*

In the trial of a murder case an instruction that the state must make out its case to a moral certainty, and until it does so, the accused is not required to do anything, and thereafter he need only raise a reasonable doubt of his innocence to entitle him to an acquittal, should have been given. *Cumberland v. State*, 521.

10. *Opinion evidence. Conclusion.*

In a trial for murder a witness should not have been permitted to express his opinion that it "looked like there had been a crap game there," he should have stated the facts and let the jury draw their own conclusions. *Ib.*

11. *Evidence. Hearsay.*

In a trial for murder the testimony of a witness, showing that the place of the killing had been pointed out to him by some one but that he did not know of his own knowledge where the killing occurred, was hearsay and inadmissible where it was not shown that he was correctly informed. *Ib.*

12. *Trial. Rebuttal.*

In a trial for murder where a witness testified to a statement made to him by another witness in a doctor's office when the doctor was not present, it was not permissible to allow the doctor to testify what the other witnesses told him about the killing since such testimony was not in rebuttal. *Ib.*

13. *Opinion evidence. Conclusion.*

It was error in a murder trial to permit testimony that a witness "reckoned that another witness had a son implicated in the killing; that is what they say" since this was purely hearsay testimony. *Ib.*

14. *Jury. Challenges to panel. Ground. Change of venue. Local prejudice.*

Where on the trial of a murder case the sheriff and the circuit clerk who took part in the selection of the venire for the week

CROPS—DAMAGES.

CRIMINAL LAW—Continued.

from which was selected the grand jury and the trial jury, were kinsmen of the deceased, and a majority of the names put into the jury box were persons residing in the supervisor's district in which the homicide occurred, on motion the court should have quashed the jury box. *Eddins v. State*, 780.

15. *Change of venire. Local prejudice.*

When the atmosphere in a county was not such as would insure a fair trial to a person charged with murder he had a right to a change of venue, especially when the sheriff and the circuit clerk who took part in the selection of the venire were kinsmen of the deceased, and a majority of the names put into the jury box were persons residing in the supervisor's district where the homicide occurred, and where after, the venire was quashed on defendant's motion, a new venire was ordered and the sheriff proceeded to summon fifty-five of the same men, thereby compelling defendant to select a jury from the very men he had rejected to their knowledge. *Id.*

See HOMICIDE.

CROPS.

See CHATTEL MORTGAGE.

DAMAGES.

1. *Appeal and error. Review. Findings.*

The findings of a chancellor, in a suit to enjoin an action for damages from the maintenance of a logging road, that the owner of land was not damaged is not conclusive, on appeal, since the owner of the land is entitled to compensation for the use of the right of way over the land in addition to damages done in digging the ditches through his lands, fields and crops. *Rice v. Lumber Co.*, 607.

2. *Punitive damages.*

In the state of Missouri, actual damages must have been sustained as a basis for the recovery of punitive damages, and in the absence of actual damages no punitive damages may be recovered. *Telegraph Co. v. Jennings*, 673.

3. *Threats. Punitive damages. Right to recover.*

Where a mayor commissioner and *ex-officio* justice of the peace acting in good faith and without malice or desire to oppress, informed plaintiff that her minor son was suspected of arson, and in a friendly manner advised her to take him and leave the city, he cannot be held for punitive damages in an action by her

DEATH.

DAMAGES—Continued.

for threatening malicious prosecution, if any damages whatever can be recovered. *Meek v. Harris*, 805.

4. *Trespass. Measure of damages. Wrongful cutting of timber.*

The measure of damages for the wrongful cutting of timber is the value of the timber cut and removed. *Lumber Co. v. Rowley*, 821.

5. *Trespass. Action for damages. Sufficiency of complaint.*

A declaration alleging that pursuant to a contract between plaintiff and defendant a lumber company, the defendant in 1911 cut timber amounting to fifty-three thousand feet and in 1912, to the amount of ten thousand feet and owed a balance thereon of thirty-eight dollars and sixty-two cents; that plaintiff notified defendant that he would expect rent for a mill site after 1911, for the first eight months of 1912 at ten dollars a month and after that at twenty dollars a month; that after notice the defendant kept trespassing on plaintiff's land, and asking damages for a willful trespass, with an itemized statement of indebtedness annexed thereto and asking judgment on the amount thereof, stated a good cause of action. *Jayne v. Nash Lumber Co.*, 841.

DEATH.

1. *Action for wrongful death. Limitations. Number of actions.*

Under Laws 1898, chapter 65, providing that actions for wrongful death should be commenced within one year after death. There was no saving clause in favor of any person and the court could not ingraft any such exception upon it. *Railroad v. Bradley*, 152.

2. *Actions for wrongful death. Limitations.*

Laws 1898, chapter 65, provided that actions for wrongful death should be commenced within one year after the death, this statute was amended by Laws 1908, chapter 167, by eliminating such limitation. But even disregarding section 97, Const. 1890, which provides that the legislature shall have no power to revive any remedy which may become barred by lapse of time or by any statute of limitation, still the act of 1908 did not authorize the bringing of an action in 1913 for a death occurring in 1902, since the limitation contained in Laws 1898 was not merely a limitation of the remedy, but of the liability itself. *Ib.*

3. *Actions for wrongful death. Limitations.*

Where a declaration alleged that in August, 1902, plaintiff's father, while in defendant's employ, was killed under circumstances that rendered defendant liable. That plaintiff was born in February, 1903; that on September 30, 1903, suit was filed by plain-

DEEDS.

DEATH—Continued.

tiff's mother in her own behalf and on behalf of another child then living to recover for the injury sustained by such death; that on the same day a final judgment was rendered in favor of the mother and such child in settlement of such injuries; and that thereafter and before plaintiff's birth such judgment was paid; that plaintiff was not a party to such suit and in no way interested therein or in the recovery had therein by her mother and sister for this sole benefit. In such case, plaintiff predicated her right of action upon the cause of action for the death, and not upon an agreed settlement not fully performed and was therefore barred under Laws 1898, chapter 65, requiring actions for wrongful death to be brought in one year after death. *Id.*

4. *Actions for wrongful death. Number of actions.*

Under Laws 1898, chapter 65, providing that in actions for wrongful death, there shall be but one suit for the same death, which shall inure to the benefit of all parties concerned, it is immaterial that a child of deceased was not born when suit by her mother was instituted, since the limitation on the number of suits is without exception in favor of any person whatever. *Id.*

5. *Actions for wrongful death. Number of actions. Good faith.*

Even conceding that a former judgment in order to constitute a bar to another suit must have been rendered in good faith, and without collusion, yet where there is nothing in the declaration in the last suit which indicates collusion in the rendition of the first judgment, the mere fact that it was rendered on the same day that the declaration was filed is insufficient for that purpose. *Id.*

DEEDS.

1. *Wills. Life estate. Adverse possession under life tenant. Vender and purchaser. Bona-fide purchaser. Notice. Record destroyed by fire. Estoppel. Failure to assert title. Ejectment. Common source of title.*

Where plaintiff's father and mother executed an instrument providing that in consideration of five dollars, and parental affection which the first parties had towards the second parties, they thereby granted, gave, bargained and sold to the second parties the lands therein described, to have and to hold as joint owners thereof in fee simple, that the first parties for themselves, their heirs covenanted and agreed to defend and warrant the title to the second parties, but that it was understood and agreed that the first parties were to hold possession and exercise control and ownership over such lands during their natural lives, and that at their death the second parties were to be the sole owners

DEEDS.

DEEDS—Continued.

thereof with personal property of which they might die seized and possessed. Such an instrument in so far as the land conveyed was not a will but a deed with the reservation of a life estate to the grantors. *Myers v. Viverett*, 334.

2. *Same.*

Under such a deed the statute of limitations did not commence to run against the grantors until the death of both the grantors. *Ib.*

3. *Vender and purchaser. Bona-fide purchaser. Notice. Record of deeds.*

Purchasers of the land were charged with notice of the title of parties claiming under a prior deed which had been recorded although the record of such deed had been destroyed by fire and not again recorded. *Ib.*

4. *Vender and purchaser. Bona-fide purchaser. Notice. Records destroyed by fire.*

Code 1906, section 3185, first enacted in 1892 providing that a lost, stolen or destroyed record shall not constitute constructive notice longer than three years from the time that chapter became operative, or from the loss, theft, or destruction, unless within that time the instrument shall again be placed of record or proceedings be begun to perfect the record, has no retrospective effect. Its clear meaning is: 1st, that a record which has been lost, stolen or destroyed prior to the time the statute became operative shall not constitute constructive notice longer than three years from such time, unless within that time the instrument shall again be placed on the record, or proceedings be begun to perfect the record and, 2nd, that a record lost, stolen or destroyed after the statute became operative shall not constitute constructive notice longer than three years from the time of the loss, theft or destruction thereof, unless within that time instrument shall again be placed on the record or proceedings be begun to perfect the record. *Ib.*

5. *Estoppel. Failure to assert title.*

Where the grantees in a second deed to land, each had constructive notice of a prior deed under which the grantees therein claimed title and it does not appear from the evidence that any one of the grantees under the second deed relied upon any act or statement of the grantees under the first deed as indicating that they claimed no interest in the land, and the record does not present a case of estoppel because of the acceptance of benefits in such case the grantees under the first deed are not estopped from asserting title to the land. *Ib.*

DEEDS.

DEEDS—Continued.

6. *Ejectment. Common source of title.*

Where a husband and wife conveyed land by deed to their children reserving a life estate in the same and the deed was duly recorded and after the death of the husband, the wife conveyed the land in fee simple to third parties. In a suit between the children and such third parties for the land, if the wife's only interest in the land was the life estate reserved in the deed to her children, then the common source of title was her husband. If the wife and not her husband, was in fact the owner of the land when the deed to the children was made, then she was the common source from which the title of the parties was derived. *Ib.*

7. *Effect. Construction.*

The question whether a person who signs a deed, but is not named in it as grantor is bound by it, should be one of construction, to be determined by reference to the circumstances connected with the transaction, rather than by a fixed and arbitrary rule of law. *Isler v. Isler*, 419.

8. *Construction. Signature and delivery. Presumption.*

By signing and delivering a deed, a party should be held presumptively to have assented to its provisions, or at all events, his intention should be considered so uncertain and ambiguous that the court should, by reference to all the circumstances not tending to contradict the deed, but to explain the conditions surrounding its execution, attempt to ascertain his meaning. *Ib.*

9. *Estoppel. Equitable estoppel. What constitutes.*

When a daughter made a deed to her father and mother to a homestead upon which she and her husband were living at the time but her husband did not join in the deed, such deed was void, and when the father afterwards purchased some mules and to secure the purchase price gave a trust deed on such land, and the same was sold out under such trust deed, the daughter who had done nothing to estop herself could claim the land from the purchaser at such trust sale. *Rosendaum Sons v. Blackwell*, 452.

10. *Logs and logging. Grant of timber right. Construction. Appeal and error. Review. Findings.*

Where a deed after conveying the pine timber on the land, further provides: "For the consideration we hereby also sell and convey to the said lumber company a right of way over, through, and across the said land for the purpose of building, maintaining and operating logging roads, dirt roads, tramroads and dummy roads for the purpose of moving said timber. For the same consideration, we likewise convey and grant to the said lumber

DEPOSITIONS—DRAINS:

DEEDS—Continued.

company a right of ingress and egress to go upon and over said land for the purpose of removing the said timber at any and all times from the date hereof not to exceed, however, eight years from the date of this deed." Such a deed did not authorize the grantee to building a logging road across the land for the purpose of hauling timber from other land. *Rice v. Lumber Co.*, 607.

See LAND AND LAND TITLES; JUDGMENTS; COVENANTS.

DEPOSITIONS.

Admissibility. Carriers. Carriage of live stock. Evidence.

Depositions taken without any notice whatever having been given to the defendant or its attorneys should not have been received in evidence. *Ill. Cent. R. Co. v. Peel*, 712.

DEPOSITORIES.

County depositories. Statutes.

Laws of 1914, chapter 257, amending section 2 of the Act of 1912, chapter 194, which requires the board of supervisors at the regular December meeting to give notice to all banks in the county, and to mail notices to each and every bank in adjoining counties, for proposals to keep county moneys and at the January term to receive proposals, does not empower the board of supervisors to deposit county funds with a bank in an adjoining county, when a bank in the county qualified as a depository, although the bank in the adjoining county offered a greater rate of interest. *Bank of Eupora v. Webster Co.*, 140.

DRAINS.

1. *Swamp land districts. Organization.*

Where a petition for the establishment of a swamp land district was filed in January, 1912, under Code 1906, section 371, the board of supervisors retained jurisdiction of the proceedings and had the right to complete the organization of the district under a law, notwithstanding the fact that before such completion, the code section was amended by Laws 1912, chapter 207, which changed the mode of procedure. *Wolford v. Williams*, 637.

2. *Swamp land districts. Injunctions.*

Where landowners were legally notified of proceedings for the establishment of a swamp land district and failed to appeal from the decision of the board of supervisors, they cannot enjoin the collection of taxes due on such swamp land district on the ground of irregularity in the proceedings. *Id.*

EJECTMENT.

Common source of title.

Where a husband and wife conveyed land by deed to their children reserving a life estate in the same and the deed was duly recorded and after the death of the husband, the wife conveyed the land in fee simple to third parties. In a suit between the children and such third parties for the land, if the wife's only interest in the land was the life estate reserved in the deed to her children, then the common source of title was her husband. If the wife and not her husband, was in fact the owner of the land when the deed to the children was made, then she was the common source from which the title of the parties was derived. *Myers v. Viverett*, 334.

ELECTIONS.

Contests. Remedies.

Under Code 1906, section 4186, providing that a person desiring to contest the election of another, returned as elected to an office within any county, may within twenty days file a petition in the office of the clerk of the circuit court of the county setting forth the ground upon which the election is contested and section 2439, providing that all the provisions of law on the subject of state and county elections shall govern municipal elections; a demurrer should be sustained to a *quo warranto* proceeding, brought by a contesting candidate for the office of marshal of a town operating under the code municipal chapter, more than twenty days after the election and where the information charged that the election commissioners erred in counting the votes and that he should have been inducted into office, since the procedure for contesting such an election provided by section 4186. Code 1906, is exclusive. *Loposser v. State ex rel.*, 240.

EMBEZZLEMENT.

Proof of conversion. Necessity.

Where defendant was charged with embezzlement, in that he collected as agent from another a premium on an insurance policy and converted the same to his own use. Where there was no evidence showing or tending to show that the money was, by the defendant, converted to his own use, he should be acquitted. *Beil v. State*, 430.

EMINENT DOMAIN.

1. *Compensation. Additional servitude.*

The laying of a second track in the streets by a street railway does not impose an additional servitude upon a street for which

ENTRY AND DETAINER—EQUITY.

EMINENT DOMAIN—Continued.

the abutting property owners are entitled to compensation.
Williams v. Light & Ry. Co., 174.

2. Compensation. Actual damages.

Under section 17, Constitution 1890, a street railway company is without power to construct or to operate a street railway in the streets of a municipality until compensation has first been made to the abutting property owners for any actual damages which will result to them therefrom, and an injunction will lie to prevent it from so doing. *Ib.*

3. Alteration of highway. Damages to abutting owners. Set-off of benefits.

Where in altering a public highway it was lowered to such a depth that it made it necessary for plaintiff to construct a new approach from the highway to his residence, he was entitled to recover at least the cost of constructing such new approach.
Merrin v. De Soto County, 254.

4. Same.

In such case the county could not offset plaintiff's damages by the benefits accruing to plaintiff because of the improvement of the highway, where such benefits were such as were received by the general public and no more. *Ib.*

5. Highway. Change of grade.

Where the commissioners of a highway district acting under the authority conferred by Acts 1910, chapter 149, with the approval of the board of supervisors, established a new grade for a highway running in front of plaintiff's property by cutting down the old grade from three to six feet thus destroying the entrance and exit to plaintiff's residence, plaintiff who had made his improvements in reference to the old grade was entitled to recover damages against the county, but not against the commissioners individually. *Graham v. Covington County*, 645.

ENTRY AND DETAINER.**Forcible. Right to maintain action. Possession.**

A landlord who has leased his land for a term and placed his tenant in possession, cannot during the term maintain an action of unlawful entry and detainer, against a stranger who entered upon the premises after the term began. *Walton v. Wall*, 361.

EQUITY.**Quietting title. Bill of complaint. Sufficiency.**

Where in a bill of complaint to quiet title complainant deraigned title from the government through a chain of title to them-

EQUITY—Continued.

selves and charged that defendant claimed title through a former suit for partition and sale which they claim was fraudulent and not by the then owners or their legal representatives, and that the sale thereunder conveyed no title, and that complainants were not parties to that suit, such a bill was not a bill of review, but states a good cause of action and a demurrer thereto should have been overruled. *Moore v. Luke*, 205.

ESTOPPEL.

1. *Gifts. Acts constituting.*

Where K. died intestate in 1901, owning a homestead upon which was a deed of trust securing notes of himself and wife, the last and all of which notes matured in October 4, 1903, G. the aunt of K's wife, shortly after all the notes reached maturity, purchased such notes, and stated to a third party, that she had bought them in order to save the homestead for K's wife and child and to give them a home; that the wife would never be able to pay them, and she would give them to her. G. died in 1913, leaving a will which made no reference to the notes, which were in her possession at the time of her death and were found among her valuable papers. In such case the holding of the chancellor that the notes were never given away by G. in her lifetime, was not manifestly wrong; the gift never having been consummated by delivery of the notes and a cancellation of the indebtedness. *Kingsbury v. Gastrell's Est.*, 96.

2. *Foreclosure.*

In such case G. if living would not have been estopped from foreclosing these notes, nor was her executrix estopped. *Id.*

3. *Failure to assert title.*

Where the grantees in a second deed to land, each had constructive notice of a prior deed under which the grantees therein claimed title and it does not appear from the evidence that any one of the grantees under the second deed relied upon any act or statement of the grantees under the first deed as indicating that they claimed no interest in the land, and the record does not present a case of estopped because of the acceptance of benefits in such case the grantees under the first deed are not estopped from asserting title to the land. *Myers v. Viverett*, 334.

4. *Equitable estopped. What constitutes.*

When a daughter made a deed to her father and mother to a homestead upon which she and her husband were living at the time but her husband did not join in the deed, such deed was void, and when the father afterwards purchased some mules and

EVIDENCE.

ESTOPPEL—Continued.

to secure the purchase price gave a trust deed on such land, and the same was sold out under such trust deed, the daughter who had done nothing to estop herself could claim the land from the purchaser at such trust sale. *Rosenbaum Sons v. Blackwell*, 452.

5. Carriers. False bills of lading. Telegram. Liability.

Under the facts in this case the sending of the telegram at the request of the shipper's agent for his accommodation by defendant's agent who was familiar with the methods by which export shipments of cotton were handled, and who knew or should have known, that the telegram was intended for the use of the purchaser of the exchange in selling it, or in disposing of the ladings, did not estop the defendant from disputing the fact that the bills of lading purchased by plaintiff were false, since the statement in the telegram was true, and its agent might presume good faith on the part of its shippers, and that no false and forged bills of lading would be offered for sale by the shipper. *New York v. Railroad Co.*, 514.

See JURISDICTION.

EVIDENCE.**1. Libel and slander. Actions.**

In an action against an insurance company for slander uttered by its agents after the beneficiary in one of its policies had recovered judgment on the policy, evidence that recovery had been contested on the ground that the policy was obtained by fraudulent representations, was admissible in mitigation of damages. *Life & Acc. Ins. Co. v. De Vance*, 196.

2. Judicial notice.

The court will take judicial notice that a given municipality was incorporated under the Code municipal chapter, and not under a special charter. *Loposser v. State ex rel.*, 240.

3. Lost instrument. Sufficiency of evidence.

In a suit upon a lost life insurance policy, where its loss and contents were sought to be proven alone by a witness who had no personal knowledge that the policy had ever been issued, or that it had ever been lost or what it contained, a peremptory instruction for the plaintiff should not have been given. *Colored Knights of Pythias v. Hill*, 249.

4. Carriers. Passengers. Injury to others.

Evidence of other shocks received by other passengers on other occasions while riding in the car in which plaintiff was a pas-

EVIDENCE—Continued.

senger at the time of her injury were admissible. *Hill v. Light & Traction Co.*, 388.

5. Opinions. Manner of injury. Electricity.

Evidence of a witness as to how and in what way a passenger on the car on which plaintiff was riding when injured might receive a severe shock, should not be excluded. *Id.*

6. Homicide. Identification.

Where the only question in a prosecution for homicide, was the identification of the murderer, it was reversible error to admit evidence that deceased a short time before his death but not as a dying declaration, identified defendant as the person who inflicted the fatal wound. *Wells v. State*, 400.

7. New trial. Grounds. Newly discovered evidence.

Where a judgment was rendered against a railroad company for the conversion of a shipment of cattle, and defendant made a motion for a new trial on the ground that since the rendition of the judgment, it had discovered that the cattle which plaintiff claimed to have shipped over its road, were sold by him to another party prior to the date of the shipment and defendant showed due diligence in discovering such evidence, a new trial should have been granted. *Southern Ry. Co. v. Elder*, 461.

8. Homicide. Instructions. Malice. Burden of proof. Sufficiency of evidence. Reasonable doubt. Self defense. Opinion evidence. Conclusion. Hearsay. Trial. Rebuttal evidence.

Where in a trial for murder the state's testimony was sufficient to sustain a conviction and the defendant's testimony made out a case of self-defense, an instruction for the state that, if the jury believed beyond a reasonable doubt that defendant shot and killed deceased, the use of a pistol was *prima facie* evidence of malice and an intent to murder, to overcome which it must be shown that at the time of the killing defendant was then in immediate, real, or apparent danger of losing his life or suffering great bodily harm from deceased, which danger must have been present and imminent at the moment of the killing, was erroneous, since in effect it shifted to defendant the burden of showing his innocence if the killing with a deadly weapon was shown. *Cumberland v. State*, 521.

9. Same.

Such an instruction was further erroneous in not stating that the jury must acquit the defendant if they have a reasonable doubt of his guilt arising from the evidence or the want of evidence. *Id.*

EVIDENCE.

EVIDENCE—Continued.

10. *Homicide. Burden of proof. Self defense.*

It is not true that, if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proven the excuse and justification and an instruction announcing this law should not have been refused defendant. *Ib.*

11. *Criminal law. Opinion evidence. Conclusion.*

In a trial for murder a witness should not have been permitted to express his opinion that it "looked like there had been a crap game there," he should have stated the facts and let the jury draw their own conclusions. *Ib.*

12. *Criminal law. Hearsay.*

In a trial for murder the testimony of a witness, showing that the place of the killing had been pointed out to him by some one but that he did not know of his own knowledge where the killing occurred, was hearsay and inadmissible where it was not shown that he was correctly informed. *Ib.*

13. *Criminal law. Opinion evidence. Conclusion.*

It was error in a murder trial to permit testimony that a witness "reckoned that another witness had a son implicated in the killing; that is what they say." since this was purely hearsay testimony. *Ib.*

14. *Secondary evidence. Public lands. Title. Prima facie title.*

Under Code 1906, sections 1960-1961, providing for the admission of copies of records of the United States offices in evidence where plaintiff claimed land under a certificate of entry from the United States, claiming it a part of the public domain, the tract book of original entries, showing that the property had been reserved as school lands and accepted by the state was admissible to establish this fact. *Halloway v. Miles*, 532.

15. *Public lands. Title. Prima facie title.*

Code 1906, section 1959, declaring that all certificates issued in pursuance of any act of Congress shall vest full legal title in the person to whom the certificate is granted, and shall be received in evidence, saving the paramount right of other persons, merely announces a rule of evidence and establishes only a *prima facie* title, which may be overcome and defeated by a superior or paramount title, and when a certificate of entry was issued by the United States land office to land which had been reserved as school land and accepted by the state, the entryman acquired no title, since the United States had none. *Ib.*

EVIDENCE—Continued.

16. *Homicide. Dying declaration. Condition of declarant. Necessity of objection. Instructions. Manslaughter.*

A dying declaration should be admitted in evidence where it clearly appeared that it was made at a time when deceased was in *extremis* and fully conscious of his impending dissolution. *Echols v. State*, 577.

17. *Corporations. President executing notes. Authority. Presumption.*

In a suit by a purchaser for value without notice of an accommodation note of a corporation, proof that the president of the corporation executed the note was *prima facie* evidence of his authority to bind the corporation in that manner. *Real Estate Co. v. First Nat. Bank*, 620.

18. *Homicide. Condition of weapon.*

In a trial for murder it was not error for the court to permit a witness for the state to testify that the rifle of deceased was on safety though several hours had elapsed since the shooting, when the evidence disclosed that all parties left the scene of the homicide immediately after the shooting, without disturbing the body of deceased, and there was nothing in the evidence to indicate that any one approached the body of the deceased for examination or other purpose before the sheriff's posse arrived. *Rester v. State*, 689.

19. *Carriers. Carriage of live stock.*

Proof that cattle were shipped in good condition when they started and that on arrival at destination one was found dead and another so badly injured that it died shortly afterwards will not alone establish negligence on the part of the carrier. *Ill. Cent. R. Co. v. Peel*, 712.

20. *Assault with intent to kill. Self defense. Corroborative evidence.*

Where in a prosecution for assault and battery with intent to kill the theory of the defense, established by his evidence, was that the person assaulted was the aggressor and that defendant acted throughout in necessary self-defense, and accused testified that when the party assaulted advanced upon him, his wife who was present, cried, "Don't, Charlie; don't do that!" there being evidence that Charlie was the injured man's name. In such case it was error to exclude the testimony of another witness who was about two hundred yards distant, from the fight, that he heard the injured man's wife cry "Don't, Charlie, don't." *Davis v. State*, 751.

21. *Railroads. Injuries to stock. Case for jury.*

Where several mules were killed by the running train of a railroad company, and the engineer testified that when killed the

 EXAMINATIONS—EXECUTIONS.

EVIDENCE—Continued.

mules were all in a bunch, but the evidence showed that they were killed several hundred yards apart, the matter of liability should have been left for the jury. *Dickerson v. Railroad*, 898.

See JURY.

EXAMINATIONS.

Witness. Cross-examination.

A defendant has a right during the trial to withdraw his plea of the statute of limitations by so stating when upon the witness stand, however this is a personal right which may be exercised voluntarily by a defendant, and until exercised it is presumed that he wished to claim the advantage of this plea, and plaintiff has no right upon cross-examinations to attempt to persuade him to withdraw it. *Holmes Bros. v. Deer*, 651.

EXECUTIONS.

1. *Claims of third persons. Affidavit. Issues. Date. Sunday. Validity. Principal and agent. Ratification.*

Under Code 1906, section 4992, so providing, on the return of an execution with affidavit and bond of a third party claiming the property, the court shall direct an issue to try the right of property, but this does not require a trial of such issue, where no valid affidavit has been filed setting forth the claim of the third person, and where the validity of the affidavit is challenged, an issue is presented which must be tried before the right of property can be tried. *Farrand Co. v. Huston*, 40.

2. *Justice of the peace. Affidavit. Amendments. Claim of property. Defenses. Fraudulent conveyances. Sale in Bulk.*

Where plaintiff recovered judgment in a justice of the peace court and made affidavit for immediate execution under Code 1906, section 2743, but the justice of the peace omitted to attach his signature to the jurat thereto, a claimant of the property levied upon under such execution cannot complain that the circuit court on appeal permitted the justice of the peace who issued the execution to attach his signature to this jurat over his objection, since no one but the defendant in execution can complain of the premature issuance thereof. *Dean v. Bowles*, 575.

3. *Justice of the peace. Claim to property. Defenses.*

Where plaintiff recovered judgment on a note in a justice of the peace court, and execution was levied upon property claimed by another, such claimant cannot defeat the execution on the ground either that there had been an attempt to materially alter the note sued on or that the action on the note was prematurely brought for neither of the objections can be inquired into in a collateral proceeding. *Ib.*

EXECUTORS AND ADMINISTRATORS.

EXECUTIONS—Continued.

4. *Claims by third person. Venue. Statutory provisions.*

The provisions of Code 1906, section 4998, that the venue of the trial of a claimant's issue may be changed on claimant's applications to the county of his residence, makes it optional with the claimant as to whether or not the claimant's issue will be tried in the county from which the execution is issued, or the county in which the property levied upon is situated and the claimant lives, and in such case if the claimant applies for a change of venue to the county in which he lives and the property is situated, the statute is mandatory and the change of venue must be granted. *Croom v. Williams*, 605.

EXECUTORS AND ADMINISTRATORS.

1. *Settlement of estates. Courts. Jurisdiction. Parties aggrieved. Construction. Power of executor and court.*

A chancellor may, in vacation, approve an executor's final account under the authority conferred by Code 1906, section 507, providing that in matters testamentary, the chancellor may do in vacation all things that may be done in term time, but all laws governing the action of the chancery court and the process and procedure therein shall apply when the chancellor acts in vacation; where the final account contains the requisites prescribed by section 2124 and where the verified written statement prescribed by section 2125 was filed with the account and where the account remained on file subject to the inspection of any person interested, and where summons was issued and executed as provided in section 2126. *Fidelity & Guaranty Co. v. State*, 16.

2. *Settlement of accounts. Jurisdiction.*

While it is technically true that the chancery court of one county cannot be held in another county, the action of the chancellor in approving, in vacation, an executor's final account pursuant to a summons, commanding the parties interested to appear before him in another county, did not invalidate the proceedings. *Ib.*

3. *Settlement of estate. Parties aggrieved.*

Where an infant beneficiary under a will received her share of the estate, and neither she nor any one acting for her complained, another beneficiary had no right to complain, the course of the procedure not defeating the purpose of the will. *Ib.*

4. *Wills. Construction. Powers of executor and court.*

Under a will directing the executor to continue the testator's business for not more than three years, during which time he shall liquidate the business, only buying such goods as may be

EXECUTORY DEVISE—EXEMPTIONS.

EXECUTORS AND ADMINISTRATORS—Continued.

necessary for the purpose, and declaring that if during the three years the executors or heirs shall think it best that the business shall cease, the executors or heirs may petition the court and it may determine the manner of disposing of the business, the court was authorized in its discretion to order the executor, who was unable to sell the business at public auction, to sell the same to one of the beneficiaries for herself and as guardian for an infant beneficiary. *Id.*

EXECUTORY DEVISE.

See WILLS.

EXEMPTIONS.**1. Wages of laborer.**

Where a board of supervisors contracted with one of the defendants to work certain portions of the public roads at a stipulated sum per mile and afterwards such defendant subcontracted with the other defendant for one-half of the proceeds of such contract, and the board issued a county warrant to the original contractor for the amount agreed upon, and while such warrant was in the warrant book in the chancery clerk's office of the county, it was levied upon under an execution issued upon a judgment against both defendants. In such case the warrant was not exempt from execution as the wages of a laborer, or person working for wages under Code 1906, section 2139, par. 10a. *Lewis v. Harrison*, 844.

2. Taxation. Charitable societies. Construction of statutes. Exemptions.

Under Code 1906, section 4251, cl. d, providing that, all property real or personal, belonging to religious or charitable societies and used exclusively for the purpose of such society and not for profit, shall be exempt from taxation and under section 4252, providing that all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benevolent order on the lodge system, where no dividends are declared, and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county and municipal taxes, the lands of an incorporated Catholic diocese the rents which are used to maintain orphans' homes are exempt; the two sections not being in conflict, the latter section merely extending the exemption of the former. *Adams Co. v. Diocese of Natchez*, 890.

FIXTURES.

1. *Vendor and purchaser. Bona fide purchaser. Notice of parol reservation. What constitutes. Statute of frauds.*

Where the owner sold a lot a portion of which was occupied by a store house extending a distance of nine feet over the lot with a parol reservation of the right to remove the house, a subsequent purchaser of the lot without notice of the reservation could maintain an action for trespass against the original owner for removing the house over his protest. *McLeod v. Clark*, 861.

2. *What constitutes.*

A store house standing on pillars, of brick and wood is a fixture and goes with the land on the sale thereof and the vendor has no right to remove the same as against an innocent purchaser from his vendee. *Id.*

3. *Statutes of frauds. Parol reservation of interest in land.*

On the sale of land a parol reservation by the vendor of the right to remove a fixture thereon, was void under the statute of frauds, as to an innocent purchaser from the vendee thereof. *Id.*

FRATERNAL INSURANCE.

See INSURANCE.

FRAUD.

1. *Sale of false bill of lading. Liability to purchaser. Carriers. Ratification.*

Where plaintiff in New York purchased false bills of lading with foreign exchange attached for two shipments of export cotton of one hundred bales each, bearing certain marks, purported to have been issued by the defendant railroad, and thereafter the alleged shipper procured the defendant railroad, which acted in good faith, to issue true bills of lading to its agent and to sign a telegram to its broker in New York, stating that it had received two export shipments of cotton of the same marks, which shipments under true bills of lading were stopped by the holder thereof, and the foreign exchange draft was never honored, and plaintiff lost the money advanced on the false bills of lading. In such case since there was no misrepresentations in the telegram, which stated the truth, plaintiff could not recover of defendant on the ground that the telegram had misled it and caused the loss. *New York v. Railroad Co.*, 514.

2. *Same.*

In such case since the railroad company was obliged to deliver the cotton to the holder in good faith on the true bill of lading

 FRAUDULENT CONVEYANCE—GARNISHMENT.

FRAUD—Continued.

or stop the shipment on the order of the true holder of the good bill of lading, there could not be any ratification of the forged bills of lading. *Ib.*

3. *Bills and notes. Validity.*

When the agent of plaintiff acting in good faith promised the defendant further credit and an extension of time, in order to secure their signatures to notes for a pre-existing debt, the fact that plaintiff later refused to extend the credit promised was not such a fraud as invalidated the notes. *Moore D. G. Co. v. Ainsworth* 705.

4. *Same.*

In such case the failure of the plaintiff to allow further credit was but a partial failure of consideration and defense to an action on the notes only in the nature of a set-off to the extent of actual loss caused by the failure of plaintiff to carry out the obligation to extend further credit. *Ib.*

FRAUDULENT CONVEYANCE.

See CONVEYANCE.

GARNISHMENT.

1. *Liability of plaintiff to third persons claiming the fund. Garnishee's suggestion of another's ownership. Effect. Collateral attack. Lien on judgment. Vendor and purchaser. Vendor's lien. Notes. Maturity. Action.*

Where a wife with a husband sold land for cash and purchase money notes, and the husband assigned his interest in the notes to his wife, and a judgment creditor of the husband garnisheed the purchaser of the land and collected money on his judgment, in such case the wife had no claims against the judgment creditor for any amount he had collected by such garnishment, as there was no privity of contract between the wife and the judgment creditor, and there was no allegation in the bill or proof that the purchaser would be rendered insolvent by paying any part of the garnisheed debt. *Russell v. Allen*, 722.

2. *Garnishee's suggestion of another's ownership. Effect.*

In such case it was the duty of the garnishee, the wife being one of the payees in the note, to suggest the wife's ownership, and thereby place the law court in a position to implead the wife and the judgment creditor as provided in Code 1906, section 2355, and where the garnishee failed to do this, the law court could render no judgment, except against the garnishee and in favor of the judgment creditor. *Ib.*

GARNISHMENT—Continued.

3. *Same.*

In such case in the absence of a plea by the garnishee that the judgment against the husband, a copayee, was void for lack of service, the wife had no right to collaterally attack the judgment recovered by her husband's creditor against her husband and the maker of the note as garnishee. *Ib.*

4. *Lien on judgment. Right of debtor's wife.*

The wife a debtor, who is with him copayee on notes, has no lien upon money recovered by a creditor of the husband against the maker of the notes in a garnishment proceeding and if the garnishee makes an unauthorized payment to the creditor of the husband, she is not concluded thereby. *Ib.*

GIFTS.

1. *Acts constituting.*

Where K. died intestate in 1901, owning a homestead upon which was a deed of trust securing notes of himself and wife, the last and all of which notes matured in October 4, 1903, G. the aunt of K's wife, shortly after all the notes reached maturity, purchased such notes, and stated to a third party, that she had bought them in order to save the homestead for K's wife and child and to give them a home; that the wife would never be able to pay them, and she would give them to her. G. died in 1913, leaving a will which made no reference to the notes, which were in her possession at the time of her death and were found among her valuable papers. In such case the holding of the chancellor that the notes were never given away by G. in her lifetime, was not manifestly wrong; the gift never having been consummated by delivery of the notes and a cancellation of the indebtedness. *Kingsburg v. Gastrell's Est.*, 96.

GUARDIAN AND WARD.

Removal. Grounds.

Where the guardian of the estate of a minor has been convicted of embezzlement in the circuit court, the chancellor is warranted in removing him without investigating into the merits of the conviction, notwithstanding he has appealed his case to the supreme court and given a *supersedeas* bond. *Clark v. Smith*, 728.

HABEAS CORPUS.

Remedy by appeal. Right to relief.

A writ of *habeas corpus* cannot successfully be invoked on the ground that a verdict in a felony case was taken in the absence of the trial judge, where the judgment was entered by

HIGHWAYS.

HABEAS CORPUS—Continued.

the clerk and was in all respects regular on its face, since the taking of the verdict was a mere irregularity which could have been corrected by motion and appeal in the trial court that convicted petitioner. *State v. Boyd*, 565.

HIGHWAYS.

1. *Alteration of highway. Damages to abutting owners. Set-off of benefits.*

Where in altering a public highway it was lowered to such a depth that it made it necessary for plaintiff to construct a new approach from the highway to his residence, he was entitled to recover at least the cost of constructing such new approach. *Merrin v. De Soto County*, 254.

2. *Same.*

In such case the county could not offset plaintiff's damages by the benefits accruing to plaintiff because of the improvement of the highway, where such benefits were such as were received by the general public and no more. *Id.*

3. *Districts. Change of organization. Notice. Statutes.*

A road district which has come under Laws 1914, chapter 176, for construction of roads by issuance of bonds and has made an issue which is outstanding, cannot also come under chapter 174, Laws 1914, for construction of roads by the proceeds of taxes, since section 14, Laws 1914, only authorizes the placing under that act districts "which have not issued bonds." *Jones v. Newton County*, 328.

4. *Same.*

Section 1, chapter 174, expressly provides that a road district shall not be created under the provisions of that act without thirty days notice of the intention of the board of supervisors to create such district and if twenty-five per cent of the qualified electors, petition against the creation, then such district cannot be created, until a majority of the qualified voters so declare in an election held for that purpose and an order of the board establishing such district, passed without any such notice or election is void. *Id.*

5. *Road taxes. Dispositions.*

While Code 1906, sections 4433 and 4469, relating to taxes collected directly for working public roads, provides that one-half of the tax collected on property within a municipality shall be paid to such municipality for street purposes, yet where under Law 1901, chapter 150, the board of county supervisors issued bonds for road purposes, and levied and collected an ad

HIGHWAYS—Continued.

valorem tax on all taxable property of the county, including property in a town which worked its own streets, the town was not entitled to one-half of the taxes collected upon urban property, since such tax was levied in the interest of the bondholders and must be paid to the owners of the bonds. *Waveland v. Hancock County*, 471.

6. *Eminent domain. Change of grade.*

Where the commissioners of a highway district acting under the authority conferred by Acts 1910, chapter 149, with the approval of the board of supervisors, established a new grade for a highway running in front of plaintiff's property by cutting down the old grade from three to six feet thus destroying the entrance and exit to plaintiff's residence, plaintiff who had made his improvements in reference to the old grade was entitled to recover damages against the county but not against the commissioners individually. *Graham v. Covington County*, 645.

HOMESTEAD.

1. *Claims of exemption. Residence. Laws. Construction. Mortgages. Capacity of mortgagor parties. Insanity. Paranoia.*

Where a wife under a decree of divorce and alimony acquired a tract of land belonging to her husband, which land was never under cultivation and on which there was never a house of any sort, except a cotton house which had not been occupied as a residence, she could not assert her claim as for a homestead in such land against the purchaser under a foreclosure of a prior trust deed, made by her husband to secure the payment of attorney fees. *Mounger v. Gandy*, 133.

2. *Laws. Construction.*

Homestead laws are liberally construed in favor of the exemptionist, but never as a pretext to claim that which does not really and substantially exist. *Ib.*

HOMICIDE.

1. *Evidence. Identification.*

Where the only question in a prosecution for homicide, was the identification of the murderer, it was reversible error to admit evidence that deceased a short time before his death but not as a dying declaration, identified defendant as the person who inflicted the fatal wound. *Wells v. State*, 400.

HOMICIDE.

HOMICIDE— Continued.

2. *Instructions. Malice. Burden of proof. Sufficiency of evidence. Reasonable doubt. Self defense. Opinion evidence. Conclusion. Hearsay. Trial. Rebuttal evidence.*

Where in a trial for murder the state's testimony was sufficient to sustain a conviction and the defendant's testimony made out a case of self-defense, an instruction for the state that, if the jury believed beyond a reasonable doubt that defendant shot and killed deceased, the use of a pistol was *prima facie* evidence of malice and an intent to murder, to overcome which it must be shown that at the time of the killing defendant was then in immediate, real, or apparent danger of losing his life or suffering great bodily harm from deceased, which danger must have been present and imminent at the moment of the killing, was erroneous, since in effect it shifted to defendant the burden of showing his innocence if the killing with a deadly weapon was shown. *Cumberland v. State*, 521.

3. *Same.*

Such an instruction was further erroneous in not stating that the jury must acquit the defendant if they have a reasonable doubt of his guilt arising from the evidence or the want of evidence. *Id.*

4. *Burden of proof. Self defense.*

It is not true that, if no excuse or justification of the killing is shown by the state's evidence, the defendant is guilty of murder unless he has by his evidence proven the excuse and justification and an instruction announcing this law should not have been refused defendant. *Id.*

5. *Character of offense. Killing in heat of passion. Instructions.*

When on a trial for homicide, there was no testimony upon which a verdict of murder should stand, but the uncontradicted facts show that the killing was done in the heat of passion, it was error for the court to give the state any instructions as to murder. *Staiger v. State*, 557.

6. *Dying declaration. Condition of declarant. Evidence. Necessity of objection. Instructions. Manslaughter.*

A dying declaration should be admitted in evidence where it clearly appeared that it was made at a time when deceased was *in extremis* and fully conscious of his impending dissolution. *Echols v. State*, 577.

7. *Appeal. Evidence. Necessity of objections.*

Where no specific objection was made in the lower court to the testimony in regard to a dying declaration, such objection can-

HOMICIDE— Continued.

not be made for the first time on appeal in the supreme court. *Ib.*

8. *Instruction. Manslaughter.*

Where on the trial of a case for homicide, the testimony submitted to the jury, viewed from different angles, and considered from different viewpoints as a whole and, separately, was sufficient to justify the jury in coming to the conclusion that the killing was unlawful and was not in self-defense but that it was not done "with malice aforethought," but in the heat of passion or upon sudden provocation, an instruction on manslaughter was properly given. *Ib.*

9. *Instructions. Manslaughter. Evidence. Verdict. Appeal. Harmless error. Condition of weapon.*

Where on a trial for murder, the evidence for the state, if believed convicted the defendant of murder, if anything, and the evidence of the defendant, if believed, established a clear case of self-defense, it was error for the court to grant the state an instruction authorizing a verdict of manslaughter. *Rester v. State*, 689.

10. *Verdict. Manslaughter. Evidence.*

In such a case a verdict of manslaughter pursuant to such instructions, not being supported by the evidence, was error. *Ib.*

11. *Same.*

In such case such instruction on manslaughter was not rendered harmless, because the verdict of manslaughter was favorable to accused. *Ib.*

12. *Instructions. Manslaughter.*

Where in a trial for murder the evidence for the state, if believed, convicted the defendant of murder, and the evidence for the defendant, if believed, established a clear case of self-defense, defendant was entitled to an instruction telling the jury expressly that they must either convict the defendant of murder or acquit. *Ib.*

13. *Evidence. Condition of weapon.*

In a trial for murder it was not error for the court to permit a witness for the state to testify that the rifle of deceased was on safety though several hours had elapsed since the shooting, when the evidence disclosed that all parties left the scene of the homicide immediately after the shooting, without disturbing the body of deceased, and there was nothing in the evidence to indicate that any one approached the body of the deceased for examination or other purpose before the sheriff's posse arrived. *Ib.*

See REWARDS.

INDICTMENT AND INFORMATION—INSANITY.

INDICTMENT AND INFORMATION.

Amendments. Right of make.

Where an indictment under Laws 1908, chapter 115, making it an offense to sell intoxicating or spirituous liquors, charged that accused did sell "spirituous and intoxicating" etc., it may be amended by the insertion of the word "liquors" after intoxicating, under Code 1906, section 1426, allowing amendments to cure formal defects; since such a defect was a mere clerical error and could not prejudice accused in his defense. *Keys v. State*, 433.

INFANTS.

Property. Sale. Power of court.

The chancery court has no inherent power to decree a sale of an infant's real estate for reinvestment. This can only be done in the way now provided by statute, to wit: a judicial sale by the regular guardian of the infant. *Clark v. Foster*, 543.

INJUNCTIONS.

1. Intoxicating liquors. Statute. Beer. "Vinous liquor." Spirituous liquors.

Under laws 1910, chapter 134, as amended by laws 1912, chapter 256, authorizing an injunction against persons who may sell or give away any "vinous or spirituous liquors" unlawfully, a person who only sold "beer" cannot be enjoined, though the beer contained alcohol, for beer is a malt liquor, and is neither a "vinous nor spirituous" liquor. *Collotta v. State*, 448.

2. Drains. Swamp land districts.

Where landowners were legally notified of proceedings for the establishment of a swamp land district and failed to appeal from the decision of the board of supervisors, they cannot enjoin the collection of taxes due on such swamp land district on the ground or irregularity in the proceedings. *Wolford v. Williams*, 637.

INSANITY.

Mortgages. Capacity of mortgagor.

The fact that one executing a deed of trust is afflicted with paranoia, which manifests itself in delusions that do not affect his ability to carry on his business, does not invalidate such deed of trust given by him, and the fact that he has been acquitted of crime on such ground in nowise estops or concludes a party claiming title through him. *Mounger v. Gandy*, 133.

INSTRUCTIONS.

1. *Trial. Peremptory instructions. Consideration of evidence.*

The evidence of the plaintiff must be, upon its application for a peremptory instruction, taken most strongly against it. *Trading Co. v. Lumber Co.*, 31.

2. *Trial. Argument of counsel.*

Every litigant in a civil case has a vested constitutional right to have his case presented to the jury by counsel, and to have the argument of his counsel heard by the jury, untrammelled by any suggestions from the court that are calculated to minimize the force or cheapen the worth of legitimate argument, and an instruction which states that the unsworn statements and arguments of attorneys are neither evidence nor law, and cannot be considered, while technically accurate, intimates that the attorneys may make statements not supported by the evidence, and practically directs the jury to disregard their arguments and is to be condemned. *O'Leary v. Railroad*, 46.

3. *Trial. Peremptory instruction. Right to. Libel and slander. Actions. Evidence.*

Where the evidence is conflicting a peremptory instruction should not be given. *Life & Acc. Ins. Co. v. De Vance*, 196.

4. *Refusal.*

The error complained of, if error in fact there is, in appellee's first instruction, set out in dissenting opinion, was cured by the granting of appellant's fifth instruction set out in the facts in this case. *Railroad v. Walls*, 256.

5. *Carriers. Injury to passengers. Directing verdict. Evidence. Injury to others. Manner of injury. Opinions. Electricity.*

Where, under the evidence, it was a question for the jury as to whether plaintiff, a passenger, received a shock on the burning off of the last of four wires carrying the current in a street car of defendant, the other three wires having previously broken, and where it was impossible to say as a matter of law that no inference of negligence was to be drawn from the absence of inspection of such wires for several months before the accident, it was error to give a peremptory instruction for defendant, since under Laws 1912, chapter 215, the receiving of an injury from the burning of a car was *prima facie* evidence of negligence on the part of the carrier. *Hill v. Light & Traction Co.*, 388.

6. *Criminal law. Trial.*

The refusal of an instruction for the defense that the jury should "not consider the physical defects of defendant as any evidence against him" was proper, since the jurors are presumed to be

INSTRUCTIONS.

INSTRUCTIONS—Continued.

men of common sense and needed no instruction of this character.
Keys v. State, 433.

7. *Appeal and error. Harmless error.*

Even though instructions given plaintiff and defendant are conflicting, if such instructions are more liberal to the party complaining than he was entitled to, it was harmless error. *American Ins. Co. v. Crawford*, 493.

8. *Appeal and error. Harmless error.*

When a fact is admitted an erroneous instruction as to the burden of proof in establishing such fact was harmless. *Ib.*

9. *Criminal law. Reasonable doubts.*

In the trial of a murder case an instruction that the state must make out its case to a moral certainty, and until it does so, the accused is not required to do anything, and thereafter he need only raise a reasonable doubt of his innocence to entitle him to an acquittal, should have been given. *Cumberland v. State*, 521.

10. *Homicide. Character of offense. Killing in heat of passion.*

When on a trial for homicide, there was no testimony upon which a verdict of murder should stand, but the uncontradicted facts show that the killing was done in the heat of passion, it was error for the court to give the state any instructions as to murder. *Staiger v. State*, 557.

11. *Homicide. Manslaughter.*

Where on the trial of a case for homicide, the testimony submitted to the jury, viewed from different angles, and considered from different viewpoints as a whole and, separately, was sufficient to justify the jury in coming to the conclusion that the killing was unlawful and was not in self-defense but that it was not done "with malice aforethought," but in the heat of passion or upon sudden provocation, an instruction on manslaughter was properly given. *Echols v. State*, 577.

12. *Trial. Ignoring defenses. Extending tie of payment. Surety. Release.*

An agreement by the payee of a note to extend for a definite period the time of payment, in consideration of the promise of the principal debtor to pay interest on the debt during such extension, constitutes a binding contract of forbearance, and will operate to discharge a surety who does not consent to the extension, and an instruction which eliminates from the consideration of the jury such defense by the surety should not be given. *Harrison v. Garner*, 586.

INSTRUCTIONS—Continued.

13. *Homicide. Manslaughter. Evidence. Verdict. Appeal. Harmless error. Condition of weapon.*

Where on a trial for murder, the evidence for the state, if believed convicted the defendant of murder, if anything, and the evidence of the defendant, if believed, established a clear case of self-defense, it was error for the court to grant the state an instruction authorizing a verdict of manslaughter. *Rester v. State*, 689.

14. *Homicide. Verdict. Manslaughter. Evidence.*

In such case such instruction on manslaughter was not rendered harmless, because the verdict of manslaughter was favorable to accused. *Rester v. State*, 689.

15. *Homicide. Manslaughter.*

Where in a trial for murder the evidence for the state, if believed, convicted the defendant of murder, and the evidence for the defendant, if believed, established a clear case of self-defense, defendant was entitled to an instruction telling the jury expressly that they must either convict the defendant of murder or acquit. *Ib.*

See RAPE; EVIDENCE.

INSURANCE.

1. *Fraternal association. Laws. Amendment. Contract. Construction. Assessments. Increase.*

A fraternal association or corporation, under the reserve power to amend its laws, whether the power be reserved in the constitution and laws or in the contract with its members, may so amend its law as to bind its members and affect their pre-existing contracts, provided the amendment be reasonable, does not impair vested rights, or radically alter its contracts with its members. *Newman v. Knights of Pythias*, 371.

2. *Mutual association. Contract.*

It is well established under the rule that it is competent for parties to contract with reference to existing or future laws and that, when application for membership in a mutual benefit association has been made, and a certificate of insurance from the association is issued to the applicant, the constitution, by-laws, application and certificate, all together, constitute the contract. *Ib.*

3. *Fraternal association. Assessments. Increase.*

Where a fraternal association had the reserve power to amend its constitution and laws, and its laws designated the rate

INSURANCE.

INSURANCE—Continued.

of assessments of its members, and provided that they should continue to pay the same amount as long as they remained a member, unless otherwise provided for by the supreme lodge of the organization, and the member agreed to pay all assessments for which he may become liable; and that he would be governed, and his contract should be controlled by all the laws then in force or that might thereafter be enacted; and that the certificate of insurance which he accepted was made dependent upon his payment of all assessments "as required," and his full compliance with laws that might be thereafter enacted. In such case an increase in a member's rate of assessment by the supreme lodge was valid and binding on him, as being within the scope of his contract. *Id.*

4. *Taxation. Insurance companies. Taxes on receipts. Cash dividends. Paid under policy contracts.*

In a suit by the insurance commissioner of the state against an insurance company for taxes on the annual premium receipts received by the company during stated periods, under Code 1906, section 2629, as amended by Laws 1912, chapter 227, providing that all life insurance companies or associations shall pay annually a tax of two and one-fourth per cent. upon the gross amount of premium receipts, less death claims, matured endowments, and cash dividends paid under policy contracts during the year; where a policyholder's dividend or share in the surplus earnings of a mutual insurance company were not, in fact, paid to the policyholder, but at their request were deducted from premiums due the policyholder, the policyholder simply paying the difference between the amount of the dividend and the amount of the premium, the money so distributed among the policyholders was "cash dividends paid under policy contracts" since what was done was equivalent to a payment of the dividend to the policyholder in cash, and its immediate return to the company in part payment of the premium due. *Life Ins. Co. v. Ins. Commissioner*, 402.

5. *Accident insurance. Right of assignees. Contract. Execution. Evidence.*

The assignee of a claim for damages under an accident insurance policy has no greater right and no superior claim than that possessed by the assignor. *Maryland Casualty Co., v. Grace*, 488.

6. *Accident insurance. Contract. Execution. Evidence.*

Where the local agent of an accident insurance company mailed a policy to the insured, who refused to accept it or pay the premium but failed to return the policy, and notified the agent

INSURANCE—Continued.

to cancel it and supposed the agent had done so, and there was no evidence that the premium had ever been paid to the company, in such case the company was not liable for a claim for damages to assured which was assigned by him after the expiration of the policy and upon which suit was brought by the assignee. *Id.*

7. *Actions. Defenses. Forfeiture. Burden of proof and error. Harmless error. Instructions.*

In a suit by insured against an insurance company where the insurer defended on the ground that its policy had been forfeited because the insured secured other insurance in violation of its provisions and the insured replied admitting the existence of the additional policy, but denied that he knew of it or accepted it or that it had ever been in his possession, the burden of proving that the second policy was accepted by the insured was on the insurer, since the replication of assured was merely a denial of the essential averments of the insurer's plea under the general issue. *American Ins. Co. v. Crawford*, 493.

8. *Fire policies. Conditions. Defenses. Waiver. Payment of premiums.*

Where the duly authorized agent of a fire insurance company informed the owner of the property afterwards burned, that his policy had expired and was told to issue a policy for a given amount on the property and the agent replied that he could consider the insurance in effect from that minute, and the policy was later written but not delivered until after the fire at which time the premium was paid, and at the time the policy was written there was a chattel mortgage on the property and there was also another insurance policy on the property but no questions were asked or answered in regard to the same. In such case the agent waived the benefits of the noninsurance and the non-mortgage clauses existing in said policy at that time; or rather he had no right to insert these two clauses in said policy, because they were not a part of the contract of insurance entered into between himself and the owner, that contract being simply that he was to issue a policy on the property for the named amount, regardless of any mortgage or any other insurance. *Scottish Union National Ins. Co. v. Wylie*, 681.

9. *Same.*

In such case where loss occurred the owner could recover on the policy though the property was mortgaged and there was other insurance on the same. *Id.*

INTERSTATE COMMERCE—COMMERCE COMMISSION.

INSURANCE—Continued.

10. *Insurance defense. Waiver. Payment of premiums.*

In such case, when the policy was not delivered nor the premium paid until after the fire and at the time of the payment of the premium the agent knew that there was a mortgage on the property and that the same was covered by other insurance, he waived the benefit of the noninsurance and nonmortgage clauses in the policy by the acceptance and retention of such premium. *Id.*

INTERSTATE COMMERCE.

Commerce. Burden upon.

Laws 1912, chapter 102, increasing privilege taxes on railroads, and fixing the privilege tax to be imposed on all railroads is, not in violation of the Constitution of the United States, Act 1, section 8, as imposing a tax or burden upon interstate commerce by assessing taxes according to interstate earnings. *M. & C. R. Co. v. State*, 290.

INTERSTATE COMMERCE COMMISSION.

1. *Commerce. Jurisdiction of courts. Action for discrimination. State anti-trust law. Wharves. Discrimination in use.*

Since only those matters must first come before the interstate commerce commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and similar questions of practice, the commission does not first have to pass upon those questions which constitute a violation or denial of unquestioned legal duties of giving service as a common carrier *per se*; and so an action for damages for discrimination in facilities on a wharf, the terminus of a railroad, need not be brought before the commission before suit in the state courts. *Gulf & I. R. Co. v. Buddendorf*, 752.

2. *Jurisdiction of courts. State. Anti-trust laws.*

Where the complaint in a state court is based on a conspiracy to monopolize a business contrary to the state anti-trust law, precedent action by the interstate commission is not required. *Id.*

3. *Wharves. Discrimination in use.*

When a railroad built a wharf at its terminal at the foot of a public street under a charter given by the city such a wharf was private property, and it was not discrimination to lease a portion of the wharf to one ship broker for storage of parcel freight, to the exclusion of another ship broker, the other portion of the wharf being used for general merchandise, and all being given

 INTOXICATING LIQUORS—JUDGMENT.

INTERSTATE COMMERCE COMMISSION—Continued.

equal terms and rates, and adequate facilities for receiving being provided for at such wharf. *Ib.*

4. *Same.*

In view of the fact that the railroad company had the right to carry on this business in the manner in which it was carried on through its own servants, it likewise had the right to carry on the same business in the same way through the agency of another. *Ib.*

INTOXICATING LIQUORS.

Injunctions. Statute. Beer. "Vinous liquor." Spirituous liquors.

Under Laws 1910, chapter 134, as amended by Laws 1912, chapter 256, authorizing an injunction against persons who may sell or give away any "vinous or spirituous liquors" unlawfully, a person who only sold "beer" cannot be enjoined, though the beer contained alcohol, for beer is a malt liquor, and is neither a "vinous nor spirituous" liquor. *Collotta v. State*, 448.

JUDGMENT.

1. *Bankruptcy. Effect on pending actions. Validity of judgment.*

Where a plaintiff recovered a judgment against defendant before a justice of the peace and defendant gave bond and appealed to the circuit court, and thereafter defendant was adjudged a bankrupt, but had not been granted a discharge before his case was brought to trial in the circuit court, and judgment was rendered against him and the sureties on his bond in that court, the bankruptcy court having authorized the plaintiff to proceed to judgment. In such case the circuit court had jurisdiction of the parties and the subject-matter, and its judgment was valid against the defendant and his sureties and a subsequent discharge in bankruptcy of defendant did not relieve his sureties. *Kohn, Weil & Co. v. Weinberg*, 275.

2. *Pleading. Declaration. Cure by verdict. Statute of joefeails.*

While it is true that in an action by the heirs for the death of a servant, the allegation in the declaration that plaintiffs were the heirs, and only heirs at law of decedent, was a mere conclusion of law, such defect was cured by verdict under Code 1906, section 808, regulating what defects in pleading are cured by verdict. *Beddingfield v. Railroad Co.*, 311.

3. *Conformity to pleading. Deeds. Effect. Construction. Contracts. Intent. Signature and delivery. Presumption.*

Where, in a suit by a divorced wife against her former husband and another, she alleged in her bill, that during the time of

JURISDICTION.

JUDGMENT—Continued.

their married life she and her husband acquired title to the land in controversy, the deed being made jointly in their names. That subsequently she joined her husband in a deed of the land to another. That she was induced to sign said deed, because she understood that it was necessary for her to do so in order that said deed should pass the interest of her said husband. But when she testified as a witness, complainant said that she was induced to sign the deed by the written agreement of her husband that she would receive one-half of the purchase price of the land. In such case the allegations of the bill did not correspond with the proof and she could not recover. *Isler v. Isler*, 419.

JURISDICTION.

1. *Executors and administrators. Settlement of estates. Courts. Parties aggrieved. Construction. Power of executor and court.*

A chancellor may, in vacation, approve an executor's final account under the authority conferred by Code 1906, section 507, providing that in matters testamentary, the chancellor may do in vacation all things that may be done in term time, but all laws governing the action of the chancery court and the process and procedure therein shall apply when the chancellor acts in vacation; where the final account contains the requisites prescribed by section 2124 and where the verified written statement prescribed by section 2125 was filed with the account and where the account remained on file subject to the inspection of any person interested, and where summons was issued and executed as provided in section 2126. *Fidelity & Guaranty Co. v. State*, 16.

2. *Executors and administrators. Settlement of accounts.*

While it is technically true that the chancery court of one county cannot be held in another county, the action of the chancellor in approving, in vacation, an executor's final account pursuant to a summons, commanding the parties interested to appear before him in another county, did not invalidate the proceedings. *Ib.*

3. *Limitation of action. Exceptions. Matters of Form. Duly commenced.*

An action which was dismissed, in order to be "duly commenced" within the meaning of Code 1906, section 3116, must not necessarily have been commenced in a court having jurisdiction of the subject-matter. On the contrary, one of the designs of the statute, with which section 147 of the Constitution is in keeping, is to protect parties who have in good faith mistaken the forum in which their causes should be tried. *Hawkins v. Ins. Co.*, 23.

JURISDICTION.

JURISDICTION—Continued.

4. *Taxation. Enjoining collection. Statutory provisions.*

Section 533, Code 1906, affords the only authority for equity jurisdiction of suits to enjoin the collection of taxes levied or attempted to be collected without authority of law. *Purvis v. Robinson*, 64.

5. *Taxation. Enjoining collection. Grounds.*

Under Code 1906, section 533, providing that the chancery court shall have jurisdiction of suits by taxpayers to restrain the collection of any taxes levied without authority of law, where a railroad commission, after investigating the question of ownership of a telegraph line along a railroad right of way, assessed it against the telegraph company and that company took no appeal to the circuit court by *certiorari*, the chancery court had no jurisdiction to enjoin the collection of the tax so assessed, even though the telegraph company did not in fact own such line, since the judgment of the railroad commission was valid on its face and whether justified or not, the exclusive remedy was by *certiorari* to the circuit court. *Telegraph Co. v. Kennedy*, 73.

6. *Bastards. Proceedings. Bond for support. Acts of court in vacation.*

Section 283, Code 1906, confers upon the circuit judge in vacation the power to discharge persons confined in jail for failure to give bond for the support of bastards, and this section is the full limit of his powers in the premises. The judge cannot in vacation commit a defendant in bastard proceedings to jail and for such commitment a writ of *habeas corpus* will lie. *Ex parte Hillman*, 207.

7. *Appeal and error. Circuit court.*

Where plaintiff in the circuit court sued on an account consisting of two items, one for one hundred and eighty-nine dollars and eight cents, and one for one hundred dollars, but introduced evidence on only the item for one hundred and eighty-nine dollars and eight cents the supreme court on appeal will presume that this item was the only amount in controversy and that hence the circuit court was without jurisdiction. *Moore v. American Surety Co.*, 322.

8. *Justice of peace. Collateral issues.*

In a suit of attachment instituted before a justice for an amount within his jurisdiction, the justice has jurisdiction to award damages for wrongfully suing out of the attachment in an amount exceeding the jurisdictional amount of justices of the peace, since defendant's claim for damages is a mere collateral matter arising out of and resulting from the issue and levy of

JURISDICTION.

JURISDICTION—Continued.

the attachment writ; and it is within the power of the legislature to confer upon courts "authority to determine all collateral matters that may arise in the process of a cause over which they have constitutional jurisdiction." *Barboro & Co. v. Serio*, 353.

9. Courts. Jurisdiction. Amount in controversy. Interest. Payment.

Under Code 1906, section 2681, so providing, payment made will be applied to accrued interest first in the absence of any agreement to the contrary, and the circuit court has jurisdiction of a suit upon a note for three hundred and twenty dollars when the accrued interest at the time of a payment of fifty dollars amounts to more than that amount. *Best v. Pitts*, 541.

10. Infant. Property. Sale. Power of court.

The chancery court has no inherent power to decree a sale of an infant's real estate for reinvestment. This can only be done in the way now provided by statute, to-wit: a judicial sale by the regular guardian of the infant. *Clark v. Foster*, 543.

11. Mechanics' liens. Enforcement. Equitable jurisdiction.

Since the aggregate amount which an owner employing a contractor to make repairs on a building can be called on to pay various materialmen, can only be ascertained after an accounting between him and the contractor, where the various materialmen bring actions at law to enforce this lien, the owner may sue in equity to compel the materialmen to propound their claims in the chancery court; the stating of the account between the owner and the contractor being a proper function of equity. *Lumber Co. v. Dlopp*, 591.

12. Appeal and error. Questions. Reviewable. Questions raised in trial court. Estoppel.

Where a cause, is not one strictly of equity cognizance, but still under section 147 of our Constitution, it was within the power of the court below to hear and determine it. In such case the question of jurisdiction, in order to be availed of in the supreme court should have been distinctly raised and insisted on in the court below. *Compress & Storage Co. v. Railroad Co.*, 602.

13. Appeal and error. Estoppel.

Where defendants in the chancery court not only did not insist on an objection to the jurisdiction of the court, but by filing cross-bill themselves submitted the whole matter in controversy to the court for adjudication, they were thereby on appeal estopped from questioning its power so to do. *Id.*

JURISDICTION—Continued.

14. *Drains. Swamp land districts. Organization.*

Where a petition for the establishment of a swamp land district was filed in January, 1912, under Code 1906, section 371, the board of supervisors retained jurisdiction of the proceedings and had the right to complete the organization of the district under a law, notwithstanding the fact that before such completion, the code section was amended by Laws 1912, chapter 207, which changed the mode of procedure. *Williams v. Williams*, 637.

15. *Garnishee's suggestion of another ownership. Effect.*

In such case in the absence of a plea by the garnishee that the judgment against the husband, a copayee, was void for lack of service, the wife had no right to collaterally attack the judgment recovered by her husband's creditor against her husband and the maker of the note as garnishee. *Russell v. Allen*, 722.

16. *Guardian and ward. Removal. Grounds.*

Where the guardian of the estate of a minor has been convicted of embezzlement in the circuit court, the chancellor is warranted in removing him without investigation into the merits of the conviction, notwithstanding he has appealed his case to the supreme court and given a supersedeas bond. *Clark v. Smith*, 728.

17. *Commerce. Interstate commerce commission. Jurisdiction of courts. Action for discrimination. State anti-trust law. Wharves. Discrimination in use.*

Since only those matters must first come before the interstate commerce commission which involve administrative functions, such as rates, switching facilities, the rate of distribution of cars, and similar questions of practice, the commission does not first have to pass upon those questions which constitute a violation or denial of unquestioned legal duties of giving service as a common carrier *per se*; and so an action for damages for discrimination in facilities on a wharf, the terminus of a railroad, need not be brought before the commission before suit in the state courts. *Gulf & S. I. R. Co. v. Buddendorf*, 752.

18. *Interstate commerce commission. Jurisdiction of courts. State. Anti-trust laws.*

Where the complaint in a state court is based on a conspiracy to monopolize a business contrary to the state anti-trust law, precedent action by the interstate commission is not required. *Id.*

19. *Public lands. Sale of timber. Setting aside. Sufficiency of bill.*

The board of supervisors has full power in the exercise of its discretion to sell timber on sixteenth section land to the lessee of the land or any one else. *State v. Blodgett*, 768.

JURISDICTION.

JURISDICTION—Continued.

20. *Judgment. Conclusiveness. Matters concluded. Appeal and error. Supersedeas bond. Statute. Construction. Principal and surety. Liability on.*

Where in a suit to enjoin a sale under a deed of trust, the grantors appealed and gave a *supersedeas* bond and in the appellate court the sureties on the bond moved to discharge it, because they had been misled into signing it, and had, before the bond was approved, notified the clerk not to approve it, and the supreme court declined to entertain the motion on the ground that such matters could not there be adjudicated in the first instance; in such case such ruling did not preclude the sureties from subsequently filing a bill in the lower court to vacate the bond and annul the judgment thereon. *Parsons-May-Oberschmidt v. Furr*, 795.

21. *Public lands. Lease. Cutting logs. Powers of board of supervisors.*

In such case the only control which the board of supervisors had over the timber was to prevent its being cut or destroyed, except in accordance with the rules of good husbandry, unless the right so to do should be purchased from it, and this right it could sell only to or with the consent of the lessee of the land, or to or with the consent of the person to whom the lessee had sold the timber and his assignee. *Lumber Co. v. Rowley*, 821.

22. *Same.*

In such case the board of supervisors had no authority either to cut or remove the timber, or to authorize appellee so to do. The only right which it did have was simply the right to sell to appellant or its assignee, the right to cut and remove the timber for uses not within the rules of good husbandry. *Ib.*

23. *Justice of the peace. Amount of controversy. Reduction of claim.*

Where an open account is first made out and presented for payment exceeded in amount the sum of two hundred dollars, the limit of a justice of the peace jurisdiction, and the creditor, acceding to the claim of the debtor that several of the items was an improper charge, acquitted the defendant from liability therefor, and credited him accordingly and omitted the items from the account, and the balance was within the jurisdiction of the magistrate, a suit subsequently brought on the account was properly begun in a justice court, and the rule forbidding the splitting of causes of action had no application. *Kantrovitz v. McNeill*, 873.

24. *Justice of the peace. Residence of defendant. Validity of judgment. Restraining enforcement.*

A justice of the peace is without jurisdiction of a cause against a resident of another district where the debt was contracted and

JURISDICTION—Continued.

the liability incurred, and which had a justice qualified to act, and a judgment by default in such case was void. *Molphus v. Lumber & Mfg. Co.*, 883.

25. *Justice of the peace. Judgment. Restraining enforcement.*

Where lands of the debtor are levied upon under execution from a void judgment the purchaser of such land from the debtor need not show a good defense to the original action, in order to restrain the sale under such execution. *Ib.*

JURY

1. *Administering. Oaths. Record. Criminal law.*

Where in a murder case the minutes of the trial court recites that twelve jurors were sworn, but named only eleven and a second order in the case named twelve, but did not recite that they were sworn, in such case the record sufficiently showed that twelve jurors were chosen and sworn, the errors being manifestly clerical. *McFarland v. State*, 482.

2. *Master and servant. Injuries to servant. Questions for jury. Defective appliances. Constitutional provision.*

In a suit by a switchman against a railroad company for injuries resulting from defective couplers on cars the court held that it was a question for the jury under the facts as to whether or not plaintiff was guilty of contributory negligence. *Gulf & S. I. R. Co. v. Dana*, 666.

3. *Challenges to panel. Grounds, criminal law. Change of venue. Local prejudice.*

Where on the trial of a murder case the sheriff and the circuit clerk who took part in the selection of the venire for the week from which was selected the grand jury and the trial jury, were kinsmen of the deceased, and a majority of the names put into the jury box were persons residing in the supervisor's district in which the homicide occurred, on motion the court should have quashed the jury box. *Eddins v. State*, 780.

JUSTICE OF THE PEACE.

1. *Records. Justice court. Substituted record. Effect.*

Where on appeal by a defendant to the circuit court from a conviction in a justice of the peace court, it appeared that the justice record had been lost and the defendant was tried *de novo* in the circuit court on a substituted record prepared by the district attorney over defendant's protest, without conforming to the statutory procedure for supplying lost records. In such case a conviction on appeal will be reversed. *Ellis v. State*, 1.

JUSTICE OF THE PEACE.

JUSTICE OF THE PEACE—Continued.

2. Jurisdiction. Collateral issues.

In a suit of attachment instituted before a justice for an amount within his jurisdiction, the justice has jurisdiction to award damages for wrongfully suing out of the attachment in an amount exceeding the jurisdictional amount of justices of the peace, since defendant's claim for damages is a mere collateral matter arising out of and resulting from the issue and levy of the attachment writ; and it is within the power of the legislature to confer upon courts "authority to determine all collateral matters that may arise in the progress of a cause over which they have constitutional jurisdiction." *Barboro & Co. v. Serio*, 353.

3. Affidavit. Amendments. Execution. Claim of property. Defenses. Fraudulent conveyances. Sale in bulk.

Where plaintiff recovered judgment in a justice of the peace court and made affidavit for immediate execution under Code 1906, section 2743, but the justice of the peace omitted to attach his signature to the jurat thereto, a claimant of the property levied upon under such execution cannot complain that the circuit court on appeal permitted the justice of the peace who issued the execution to attach his signature to this jurat over his objection, since no one but the defendant in execution can complain of the premature issuance thereof. *Dean v. Bowles*, 575.

4. Execution. Claim to property. Defenses.

Where plaintiff recovered judgment on a note in a justice of the peace court, and execution was levied upon property claimed by another, such claimant cannot defeat the execution on the ground either that there had been an attempt to materially alter the note sued on or that the action on the note was prematurely brought for neither of the objections can be inquired into in a collateral proceeding. *Ib.*

5. Jurisdiction. Amount of controversy. Reduction of claim.

Where an open account is first made out and presented for payment exceeded in amount the sum of two hundred dollars, the limit of a justice of the peace jurisdiction, and the creditor, acceding to the claim of the debtor that several of the items was an improper charge, acquitted the defendant from liability therefor, and credited him accordingly and omitted the items from the account, and the balance was within the jurisdiction of the magistrate, a suit subsequently brought on the account was properly begun in a justice court, and the rule forbidding the splitting of causes of action had no application. *Kantrovitz v. McNeill*, 873.

LANDLORD AND TENANT.

JUSTICE OF THE PEACE—Continued.

6. *Jurisdiction. Residence of defendant. Validity of judgment. Restraining enforcement.*

A justice of the peace is without jurisdiction of a cause against a resident of another district where the debt was contracted and the liability incurred, and which had a justice qualified to act, and a judgment by default in such case was void. *Molphus v. Lumber & Mfg. Co.*, 883.

7. *Jurisdiction. Judgment. Restraining enforcement.*

Where lands of the debtor are levied upon under execution from a void judgment the purchaser of such land from the debtor need not show a good defense to the original action, in order to restrain the sale under such execution. *Ib.*

LANDLORD AND TENANT.

1. *Frauds, statute of. Tenancy from year to year. Termination of tenancy. Notice to quit. Necessity.*

Where a tenant entered upon the rented premises in pursuance of an oral agreement and as a lessee of the landlord and executed and delivered his five annual rent notes and paid the periodical rent agreed upon for four years without question, in such case regardless of the statute of frauds, a periodical tenancy was created and the tenant became a tenant from year to year, and a purchaser who bought the land during the last year of the term could not dispossess the tenant without giving two months' notice in writing to terminate the tenancy as required by Code 1906, section 2882. *Scruggs v. McGehee*, 10.

2. *Turpentine leases. Actions. Evidence. Deficiency in leased lands. Recovery. Burden of Proof. Timber leases. Construction.*

When the lessee of timber lands claimed that there was a deficiency of acreage under his contract, it had the burden of showing the amount of the shortage. *Lumber Co. v. Turpentine Co.*, 848.

3. *Timber lease. Construction.*

Where defendant leased to complainant lands for the purpose of turpentineing, which were described as containing approximately six thousand, nine hundred and thirteen acres of timber and the contract of lease recited that the lessee might box for turpentine purposes all merchantable pine timber, and that the term "merchantable pine timber" should mean any tree of sufficient size to square not less than four inches. In such case in view of other provisions for turpentineing a fixed number of acres each year and for the location by the lessor of the lands to be turpentineed yearly, the lessor was not bound to furnish virgin timber of the acreage specified. *Ib.*

LAWS 1852—LAWS 1912

LANDLORD AND TENANT—Continued.

4. *Timber leases. Construction. Deficiency.*

Under the facts in this case, the contract of lease was a contract in gross or in bulk, so that no recovery for shortage in the acreage of the timber could be maintained where the shortage did not amount to deception or fraud. *Ib.*

LAWS 1852.

- Ch. 68. Adverse possession. Lost deed. Acts of ownership. Presumption. *Hewling v. Blake*, 225.

LAWS 1898.

- Ch. 65. Death. Action for wrongful death. Limitations. Number of actions. *Railroad v. Bradley*, 152.

LAWS 1901.

- Ch. 150. Highways. Road taxes. Dispositions. *Waveland v. Hancock County*, 471.

LAWS 1908.

- Ch. 100. Fraudulent conveyance. Sale in Bulk. Statutes. *Dean v. Bowles*, 575.
- Ch. 115. Indictment and information. Amendments. Right of make. *Keys v. State*, 433.
- Ch. 195. Master and Servant. Fellow servant. Statute. Railroad. Injury to employee. Neglect to fellow servant. Abrogation of doctrine. *Hunter v. Ingram-Day Lumber Co.*, 744.
- Ch. 239. Taxation. Assessment. Validity of Statute. *Horton v. King*, 859.

LAWS 1910.

- Ch. 256. Intoxicating liquors. Injunctions. Statute. Beer. "Vinous liquor." Spirituous liquors. *Collotta v. State*, 448.

LAWS 1912.

- Ch. 102. Railroads. Privilege tax. Right to impose. Commerce. Interstate commerce. Burden of Proof. *M. & O. R. Co. v. State*, 290.
- Ch. 207. Drains. Swamp land districts. Organization. *Wolford v. Williams*, 637.
- Ch. 215. Carriers. Injury to passengers. Directing verdict. Evidence. Injury to others. Manner of injury. Opinions. Electricity. *Hill v. Light & Traction Co.*, 388.
- Ch. 232. Statutes. Amendment. Reference to title. Constitutionality. *Seay v. Plumbing & Metal Co.*, 834.

LAWS 1914.

- Ch. 176. Highways. Districts. Change of organization. Notice. Statutes. *Jones v. Newton County*, 328.
- Ch. 257. Depositories. County depositories. Statutes. *Bank of Eupora v. Webster Co.*, 140.

LEGISLATURE.

Constitutional law. Delegation of power.

While the legislature cannot delegate its power to make a law, it can make a law to delegate a power to determine some fact or state of things, upon which the law makes, or intends to make, its own action depend, and so it may delegate to a railroad commission, the right to determine questions of fact; such as, whether a railroad falls within a given class for purpose of license taxes under Laws 1912, chapter 102. *M. & C. R. Co. v. State*, 290.

LIABILITY

1. *Shipping. Demurrage. Delay in loading. Contract. Construction of charter party. Waiver by acceptance of cargo. Trial. Peremptory instructions. Consideration of evidence.*

In a suit to recover demurrage paid to the master of a vessel for delay in the loading of lumber, which delay was alleged to have been caused by the wrongful acts of defendant's inspector, in refusing to accept certain lots of lumber tendered for inspection, where it did not appear that such acts delayed the loading, or that they were willful and reckless, plaintiff was not entitled to judgment. *Trading Co. v. Lumber Co.*, 31.

2. *Bail. Bonds. Statutes.*

Under Code 1906, section 1466, providing that all bonds or recognizances, conditioned for the appearance of any party in any state case or criminal proceedings, which shall free such party from jail, shall be valid, and under section 1467, providing that all bonds and recognizances in criminal cases, whether they describe the offense actually committed or not, shall have the effect to hold the party bound thereby to answer such offense, and shall be valid until he is discharged by the court, where defendant's principal was charged with feloniously and knowingly receiving stolen goods, while the bond bound him to appear and answer a charge of receiving stolen goods. In such case if the principal was released, the bond was effective, and the sureties could not escape liability on the ground that the offense described in the bond was different from that charged in the indictment. *Allen v. State*, 384.

LIABILITY.

LIABILITY—Continued.

3. *Fraud. Sale of false bill of lading. Liability to purchaser. Carriers. Ratification.*

Where plaintiff in New York purchased false bills of lading with foreign exchange attached for two shipments of export cotton of one hundred bales each, bearing certain marks, purported to have been issued by the defendant railroad, and thereafter the alleged shipper procured the defendant railroad, which acted in good faith, to issue true bills of lading to its agent and to sign a telegram to its broker in New York, stating that it had received two export shipments of cotton of the same marks, which shipments under true bills of lading were stopped by the holder thereof, and the foreign exchange draft was never honored, and plaintiff lost the money advanced on the false bills of lading. In such case since there was no misrepresentations in the telegram, which stated the truth, plaintiff could not recover of defendant on the ground that the telegram had misled it and caused the loss. *New York v. Railroad Co.*, 514.

4. *Same.*

In such case since the railroad company was obliged to deliver the cotton to the holder in good faith on the true bill of lading or stop the shipment on the order of the true holder of the good bill of lading, there could not be any ratification of the forged bills of lading. *Id.*

5. *Partnership. Dissolution. Powers and liabilities of members.*

The power of one partner to bind another by executing a note in the partnership name, for a debt of the firm, is at an end when the partnership is dissolved. *Boswell Bros. v. Shoe Co.*, 553.

6. *Counties. Board of supervisors. Unauthorized act. Pleading. Demurrer. Admission.*

When the board of supervisors of a county entered an order requiring all live stock in the county to be vaccinated and appointed a person to vaccinate such stock, who over plaintiff's protest vaccinated a horse, which in consequence contracted lockjaw and died, in such case the county was not liable for such death, since the board of supervisors acted without authority and a county is not liable for the unauthorized acts of its board of supervisors. *Harrison County v. Marione*, 592.

7. *Covenants. Covenant against incumbrances. Breach. General covenants.*

Where a vendor sold land for a valuable consideration by a general warranty deed, the granting clause of which was "do hereby sell, convey and warrant" and further provided, "to have and to hold the same free from and against the legal claims of all

LIABILITY—Continued.

persons whomsoever," which land had been previously assessed for taxes, and which was sold for taxes, and not redeemed within two years, where such tax lien had been unknown to the vendors and where the vendor, having notice of the tax sale in time to redeem, acted upon legal advice and failed to redeem, but in no way misled the vendor. In such case the vendee was entitled to recover of the vendor the consideration paid for the land. *Sisters of Perpetual Adoration v. Jane*, 612.

8. *Garnishment. Liability of plaintiff to third persons claiming the fund. Garnshee's suggestion of another's ownership. Effect. Collateral attack. Lien on judgment. Vendor and purchaser. Vendor's lien. Notes. Maturity. Action.*

Where a wife with her husband sold land for cash and purchase money notes, and the husband assigned his interest in the notes to his wife, and a judgment creditor of the husband garnisheed the purchaser of the land and collected money on his judgment, in such case the wife had no claims against the judgment creditor for any amount he had collected by such garnishment, as there was no privacy of contract between the wife and the judgment creditor, and there was no allegation in the bill or proof that the purchaser would be rendered insolvent by paying any part of the garnisheed debt. *Russell v. Allen*, 722.

9. *Receivers. Assets. Claims of third persons.*

Under Code 1906, section 4784, providing that if a person transacts business in a company name, and fails to disclose the name of his partner by a conspicuous sign at the house where the business is transacted, the property used or acquired in the business shall, as to the creditors of such person, be liable to his debts. Where the goods of a harvester company were placed in the storehouse of a hardware company which acted as its agent, behind the sign of the hardware company, the business being conducted by the hardware company and the goods apparently formed a part of the regular stock of merchandise, there being no sign of the harvester company except an advertisement of the hardware company that it carried the products of the harvester company as part of its stock in trade. In such case the property belongs to the hardware company as to creditors, and a receiver of the hardware company is entitled to possession thereof, notwithstanding that previous to the appointment of the receiver the harvester company had instituted an action for the property and had given bond and taken possession of the same. *Hardware Co. v. Harvester Co.*, 783.

LIBEL AND SLANDER—LIMITATION OF ACTIONS.

LIABILITY—Continued.

10. *Threats. Punitive Damages. Right to recover.*

Where a mayor commissioner and *ex-officio* justice of the peace acting in good faith and without malice or desire to oppress, informed plaintiff that her minor son was suspected of arson, and in a friendly manner advised her to take him and leave the city, he cannot be held for punitive damages in an action by her for threatening malicious prosecution, if any damages whatever can be recovered. *Meek v. Harris*, 805.

11. *Attorney and client. Suit for fee. Decree.*

Where two attorneys had recovered judgment for a client against a lumber company and the sureties on its bond of which judgment they were entitled to a part as attorney fees, and the lumber company paid the amount of the judgment to a bank and said bank paid over to one of the attorneys, D all of the other attorney M's part of such judgment except three hundred dollars which money so paid said attorney remitted to his associate M. The bank claimed that the attorney D owed it three hundred dollars and with the consent of D, credited this amount upon the debt owing it by D, who thereupon marked the judgment satisfied of record. In such case where the attorney M sued his associate and the lumber company and the bank for the three hundred dollars not paid him, he could only recover against the bank which was in possession of the money. *Bank of Collins v. Miller*, 871.

LIBEL AND SLANDER.

Actions. Evidence.

In an action against an insurance company for slander uttered by its agents after the beneficiary in one of its policies had recovered judgment on the policy, evidence that recovery had been contested on the ground that the policy was obtained by fraudulent representations, was admissible in mitigation of damages. *Life & Acc. Ins. Co. v. De Vance*, 196.

LIFE ESTATE.

See WILLS.

LIMITATION OF ACTIONS.

1. *Exceptions. Dismissal of actions. New action. Misjoinder. Dismissal. Jurisdiction. Matters of form. Duly commenced.*

Where an action duly commenced within the time allowed is dismissed for want of jurisdiction, under Code 1906, section 311b, so providing, the plaintiff may commence a new action for the

LIMITATION OF ACTIONS—Continued.

same cause, at any time within one year after such dismissal and where the commencement of the new action was more than six years after the accrual of the original cause but within one year of the time of the dismissal of the first action, a demurrer to a replication to the plea of the statute of limitations, setting up that the action was begun within one year after dismissal of the former suit should not be sustained. *Hankins v. Ins. Co.*, 23.

2. *Exceptions. New action.*

Code 1906, section 3116, permitting the bringing of the actions within one year after dismissal of a cause for matters not affecting the merits, applies when the suit dismissed embraced the cause of action sued on in the second, even though it also embraced other and distinct causes of action asserted against parties other than the defendant in the second suit. *Ib.*

3. *Misjoinder. Dismissal. New actions.*

Where several independent causes of action are brought in one suit in equity the court having no jurisdiction on account of such joinder, a dismissal of the cause by the court on appeal was a "dismissal for matter of form under Code 1896, section 3116, and an action brought on one of the causes so joined within one year after such dismissal was properly brought. *Ib.*

4. *Exceptions. Jurisdiction. Matters of Form. Duly commenced.*

An action which was dismissed, in order to be "duly commenced" within the meaning of Code 1906, section 3116, must not necessarily have been commenced in a court having jurisdiction of the subject-matter. On the contrary, one of the designs of the statute, with which section 147 of the Constitution is in keeping, is to protect parties who have in good faith mistaken the forum in which their causes should be tried. *Ib.*

5. *Compensation of period of limitation. Death of debtor. Gifts. Acts constituting. Estoppel. Foreclosure.*

It is a general rule of the law, that where a cause of action against a person has not accrued at the date of his death, the general statute of limitations does not commence to run until there is an administration of his estate, in the absence of legislation to the contrary. *Kingsbury v. Gastrell's Est.*, 96.

6. *Death. Action for wrongful death. Limitations. Number of actions.*

Under Laws 1898, chapter 65, providing that actions for wrongful death should be commenced within one year after death. There was no saving clause in favor of any person and the court could not ingraft any such exception upon it. *Railroad v. Bradley*, 152.

LOGS AND LOGGING.

LIMITATION OF ACTIONS—Continued.

7. *Death. Actions for wrongful death. Limitations.*

Laws 1898, chapter 65, provided that actions for wrongful death should be commenced within one year after the death, this statute was amended by Laws 1908, chapter 167, by eliminating such limitation. But even disregarding section 97, Const. 1890, which provides that the legislature shall have no power to revive any remedy which may become barred by lapse of time or by any statute of limitation, still the act of 1908 did not authorize the bringing of an action in 1913 for a death occurring in 1902, since the limitation contained in Laws 1898 was not merely a limitation of the remedy, but of the liability itself.

8. *Death. Actions for wrongful death.*

Where a declaration alleged that in August, 1902, plaintiff's father, while in defendant's employ, was killed under circumstances that rendered defendant liable. That plaintiff was born in February, 1903; that on September 30, 1903, suit was filed by plaintiff's mother in her own behalf and on behalf of another child then living to recover for the injury sustained by such death; that on the same day a final judgment was rendered in favor of the mother and such child in settlement of such injuries; and that thereafter and before plaintiff's birth such judgment was paid; that plaintiff was not a party to such suit and in no way interested therein or in the recovery had therein by her mother and sister for this sole benefit. In such case, plaintiff predicated her right of action upon the cause of action for the death, and not upon an agreed settlement not fully performed and was therefore barred under Laws 1898, chapter 65, requiring actions for wrongful death to be brought in one year after death. *Id.*

9. *Running of statutes. Remainderman.*

Where land was devised in trust to one for life, with remainder to another and was wrongfully sold, the fact that the trustee's rights were barred by limitation will not bar the remaindermen from securing cancellation of the deed, under Code 1906, section 3123 (Code 1892, section 2761), providing that the running of the statute of limitations against the trustee shall bar the beneficiary, where the life tenant is still alive for until her death the remaindermen have no right to possession, and the trustee's failure to sue could not bar them. *Clark v. Foster*, 543.

LOGS AND LOGGING.

1. *Grant of timber right. Construction. Appeal and error. Review. Findings.*

Where a deed after conveying the pine timber on the land, further provides: "For the consideration we hereby also sell and con-

LOGS AND LOGGING—Continued.

vey to the said lumber company a right of way over, through, and across the said land for the purpose of building, maintaining and operating logging roads, dirt roads, tramroads and dummy roads for the purpose of moving said timber. For the same consideration, we likewise convey and grant to the said lumber company a right of ingress and egress to go upon and over said land for the purpose of removing the said timber at any and all times from the date hereof not to exceed, however, eight years from the date of this deed." Such a deed did not authorize the grantee to build a logging road across the land for the purpose of hauling timber from other land. *Rice v. Lumber Co.*, 607.

LOST INSTRUMENT

Sufficiency of evidence.

In a suit upon a lost life insurance policy, where its loss and contents were sought to be proven alone by a witness who had no personal knowledge that the policy had ever been issued, or that it had ever been lost or what it contained, a peremptory instruction for the plaintiff should not have been given. *Colored Knights of Pythias v. Hill*, 249.

MANSLAUGHTER.

See HOMICIDE.

MASTER AND SERVANT

1. *Independent contractors. Who are. Trial verdict. Sufficiency.*

Where a railroad company entered into a contract with a contractor for the execution and removal of dirt from one part of its right of way to another and it was provided in the contract that the railroad company's trains should have preference over those of the contractor, that the contractor's train crew should be such as were satisfactory to the railroad company's superintendent and required to pass such examination as he might prescribe, that any who were unsatisfactory might be discharged, and that the contract should not be sublet save with the consent of the railroad company's chief engineer, and where the chief engineer consented to the subletting of part of the contract, and plaintiff, an employee of the railroad company, was directed to report to the contractor for service on one of his trains, and while so engaged, was injured through the negligence of a fireman employed by the subcontractor over whom the principal contractor exercised no control. In such case the contractor was not liable for his injuries, the negligent servant being that of an independent contractor. *Callahan v. Rayburn*, 107.

MASTER AND SERVANT.

MASTER AND SERVANT—Continued.

2. *Same.*

An independent contractor is one who renders service in the course of an occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. *Ib.*

3. *Independent contractor. Who are.*

As the railroad company had supervision over the employees of the subcontractor, such contractor was not as to it an independent contractor, and plaintiff could recover from the railroad company. *Ib.*

4. *Release. Limited release. Effect. Injuries to servant. Pleading. Declaration. Cure by verdict. Statute of jeofails. Demurrer. Necessity to assign grounds. Statute.*

Where the release of an injured servant to the master, was not a general release, but a limited one, covering only such damages as resulted to him from the bruising of his shoulder, such a release did not cover other injuries which were unknown to the parties at the time the release was executed. *Beddingfield v. Railroad Co.*, 311.

5. *Injuries to servant. Pleading. Declaration.*

Where in a suit by the heirs of a servant for injuries caused by being struck by the head of a hammer, the declaration alleged that the master "negligently and carelessly furnished the said Joe Smith (plaintiff's fellow servant, who was striking a chisel which plaintiff's intestate held), with a sledge hammer to be used in cutting off the top of bolts, the handle of which hammer was defective in this, that it was shivered and shattered, which caused said sledge hammer to be and was loose on the handle." Such a declaration was not defective in not alleging that the hammer was loose on the handle or that the handle was shivered and shattered when furnished for use by the master. *Ib.*

6. *Injury. Question for jury.*

In an action by a servant for injury in repairing machinery where there is a sharp conflict in the evidence as to whether plaintiff followed or disobeyed instructions the case should go to the jury. *Lumber Co. v. Bontall*, 332.

7. *Contract. Compensation.*

Where under the contract either party could terminate it at pleasure, a servant who only worked seven days in a month before he was discharged, can only recover for such time as he worked and not for the whole month. *Railroad Co. v. Monroe*, 550.

MASTER AND SERVANT.

MASTER AND SERVANT—Continued.

8. *Injuries to servant. Questions for jury. Defective appliances. Constitutional provision.*

In a suit by a switchman against a railroad company for injuries resulting from defective couplers on cars the court held that it was a question for the jury under the facts as to whether or not plaintiff was guilty of contributory negligence. *Gulf & S. I. R. Co. v. Dana*, 666.

9. *Defective appliances. Constitutional provisions.*

A yard foreman switchman does not come within the excepted class of employees. Under section 193 of the Constitution which provides that "knowledge by any employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductor or engineers in charge of dangerous or unsafe cars or engines voluntarily operated by them. *Id.*

10. *Fellow servant. Statute. Railroad. Injury to employee. Neglect of fellow servant. Abrogation of doctrine.*

A railroad equipped with cars propelled by steam and run on tracks including a "skidder" operated by steam, to draw logs to the cars by means of a cable, and a "ladder," which was operated by steam, and to load the logs on the cars, is such a railroad as is contemplated by Laws 1908, chapter 195, section 1, which provides that "every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever propelled by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, shall have the same rights, and remedies for any injury suffered by him from the act or omission of such railroad corporation or others or their employees as are allowed by law to other persons not employed. *Hunter v. Ingram-Day Lumber Co.*, 744.

11. *Injury to employee. Negligence of fellow servant.*

Where plaintiff an employee of a lumber company was injured while employed in loading one of its cars by means of a steam "loader" by reason of the failure of a fellow servant who was engaged in operating a steam "skidder," to give the usual warning signal, he was within the protection of Laws, 1908, chapter 194, section 1, and may recover for injuries sustained by reason of the negligence of a fellow servant. *Id.*

 MECHANIC LIENS—MORTGAGES.

MECHANIC LIENS.

Enforcement. Equitable jurisdiction.

Since the aggregate amount which an owner employing a contractor to make repairs on a building can be called on to pay various materialmen, can only be ascertained, after an accounting between him and the contractor, where the various materialmen bring actions at law to enforce this lien, the owner may sue in equity to compel the materialmen to propound their claims in the chancery court; the stating of the account between the owner and the contractor being a proper function of equity. *Lumber Co. v. Deopp*, 591.

MORTGAGES.

1. *Foreclosure by sale. Defective notice. Statute. Appeal and error. Review. Questions first raised on appeal.*

Where a sale *in pais* is made by a trustee under an instrument conferring a power of sale upon him under certain prescribed conditions, a substantial compliance with the mode, manner and time prescribed is essential to pass the title, and any disregard of them in any important respect will vitiate the sale. *Wilezinski v. Watson*, 86.

2. *Same.*

Code 1906, section 2772, declaring that the sale of mortgaged lands shall be advertised for three consecutive weeks preceding the sale, and that no sale shall be valid unless so advertised, regardless of any contract to the contrary, does not take away the right of the parties to contract for a longer period of advertisement, and where a trust deed provided for thirty days advertised notice of sale, a sale made after only twenty-two days of publication of notice of sale did not comply with its terms and a sale was not valid in such case. *Ib.*

3. *Capacity of mortgagor. Insanity.*

The fact that one executing a deed of trust is afflicted with paranoia, which manifests itself in delusions that do not affect his ability to carry on his business, does not invalidate such deed of trust given by him, and the fact that he has been acquitted of crime on such ground in nowise estops or concludes a party claiming title through him. *Mounger v. Gandy*, 133.

4. *Usury. Rights and remedies of third persons. Application of payments.*

A junior mortgagee is entitled to have the senior mortgagee's debt purged of usury, and where personal property covered by both mortgages has been delivered to the senior mortgagee without

MORTGAGES—Continued.

public sale, he must take it at its market value. *Wilczinski v. Smith*, 251.

5. *Vendor's lien. Priority.*

In such case where the mortgagee of the vendee was fully informed of the terms of the contract of purchase and was aware of the fact that this balance of one thousand dollars was due the vendor, his rights under his mortgage will be subordinated to the rights of the vendor. *Mayes v. Coleman*, 874.

See CHATTEL MORTGAGE.

MUNICIPAL CORPORATIONS.

Vacating streets. Appeal. Bill of exceptions. Statutes.

Under Code 1906, section 80, giving a right of appeal to any person aggrieved by a city's action, and requiring that the bill of exceptions embodying the facts, if duly presented, shall be signed by the presiding officer of the acting board or of the municipal authorities. Where in proceedings to close an alley objections were filed, and upon issuance by the city authorities of an order closing the alley, the objector presented to the mayor and commissioners a bill of exceptions, which although the mayor approved it as correct, he, under the advice of counsel, refused to sign, unless compelled by mandamus. In such case the appeal to the circuit court was properly perfected, section 80, providing a summary proceeding for appeals of this character, even investing the circuit court with jurisdiction of the whole record, the actual consent of the mayor to the correctness of the bill being sufficient to perfect the appeal, there being no time prescribed by section 80 within which an appeal must be prosecuted, only that the party aggrieved should appeal "to the next term of the circuit court." In such case sections 83 and 95, Code 1906, have no application. *Polk v. City of Hattiesburg*, 81.

NEGLECTANCE.

Master and servant. Injury to employee. Negligence of fellow servant.

Where plaintiff an employee of a lumber company was injured, while employed in loading one of its cars by means of a steam "loader" by reason of the failure of a fellow servant who was engaged in operating a steam "skidder" to give the usual warning signal, he was within the protection of Laws 1908, chapter 194, section 1, and may recover for injuries sustained by reason of the negligence of a fellow servant. *Hunter v. Ingram-Day Lumber Co.*, 744.

NEW TRIALS—PARENT AND CHILD.

NEW TRIALS.

See TRIALS.

NOTICE.

1. *Mortgages. Foreclosure by sale. Defective notice. Statute. Appeal and error. Review. Questions first raised on appeal.*

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3. *Bills and notes. Assignment.*

Where the maker gave his note to a bank of which he was a director and the bank assigned the note to a third party and the director when making a payment upon the note to the cashier was told that it was not in the bank, he could not claim that he made the payment to his bank without notice of the assignment, since being put upon inquiry and able to ascertain the true facts he was chargeable with notice that his note had been assigned. *First Nat. Bank v. Dean*, 214.

NUISANCE.

Street railroads. Public nuisance. Abatement. Special damage.

The laying of an additional track in a street does not constitute a public nuisance, from which abutting property owners sustain such special damage as will entitle them to the abatement thereof. *Williams v. Light & Ry. Co.*, 174.

PARENT AND CHILD.

Seduction. Rights of parents. Action for damages. Bar by bastardy. Proceeding.

- A proceeding against a defendant for bastardy under Code 1906, chapter 15, which was settled by the payment of two hundred dollars to the prosecutrix did not bar an action by her father for damages for her seduction. *Delancey v. Byrd*, 598.

PARTIES—PLEADING AND PRACTICE.

PARTIES.*Trial. Amendment. Lost instrument. Sufficiency of evidence.*

Where the administrator of the estate of a deceased brought suit upon a life insurance policy and it was subsequently discovered that the policy was payable to the wife and children of deceased, an amendment substituting them as plaintiffs should be allowed. *Colored Knights of Pythias v. Hill*, 249.

PARTNERSHIP.*Dissolution. Powers and liabilities of members.*

The power of one partner to bind another by executing a note in the partnership name, for a debt of the firm, is at an end when the partnership is dissolved. *Boswell Bros. v. Shoe Co.*, 553.

PEACE BOND.**1. Statutes. Effect of appeal bond. Breach of the peace.**

The peace bond authorized by Code 1906, section 1561, is an additional penalty which the court may or may not impose upon persons who have been convicted of a criminal offense. The general sections of the Code preceding section 1561, relating to peace bonds have no application to the peace bond provided for under this section. *City of Jackson v. Belew*, 243.

2. Breach of the peace. Effect of appeal bond.

A peace bond given under section 1561, Code 1906, is superseded when the convict executes an appeal bond, since the peace bond is incidental to, and a part of, the penalty imposed by the court. *Id.*

3. Vagrancy. Sentences. Excessive sentence.

A defendant convicted of vagrancy under Code 1906, section 5058, which provides that a party convicted of vagrancy shall be committed to jail for not less than ten nor more than forty days and shall not be liberated from such sentence by payment for the time to be served, unless such person gives bond with sufficient security for future industry and good conduct for one year from the date of the bond, cannot be required to give bond to keep the peace for two years, and such a provision will render the whole judgment excessive and unlawful. *Daniels v. State*, 440.

PLEADING AND PRACTICE.**1. Limitation of actions. Misjoinder. Dismissal. New action.**

Where several independent causes of action are brought in one suit in equity the court having no jurisdiction on account of such joinder, a dismissal of the cause by the court on appeal was

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

- a "dismissal for matter of form under Code 1896, section 3116, and an action brought on one of the causes so joined within one year after such dismissal was properly brought. *Hawkins v. Ins. Co.*, 23.
2. *Execution. Claims of third persons. Affidavit. Issues. Date. Sunday. Validity. Principal and agent. Ratification.*
- Under Code 1906, section 4992, so providing, on the return of an execution with affidavit and bond of a third party claiming the property, the court shall direct an issue to try the right of property, but this does not require a trial of such issue, where no valid affidavit has been filed setting forth the claim of the third person, and where the validity of the affidavit is challenged, an issue is presented which must be tried before the right of property can be tried. *Farrand Co. v. Huston*, 40.
3. *Taxation. Action to confirm tax title. Cure. Statutes.*
- Where a bill to confirm a title purchased at a tax sale, alleged that one of the defendants was claiming title and had executed a deed of trust to the other defendant, that the property had been legally assessed to an unknown owner for taxes due the county, that after the collector's failure to sell for delinquent taxes the county board of supervisors by order entered on its minutes directed the sheriff to sell it on a certain date, that after due advertisement the collector made the sale on such date and executed a deed to the purchaser at the expiration of two years and complainant had title from such purchaser. The defects if any there were in the allegations of the bill of complaint were cured by sections 4332 and 4367, Code 1906, and a demurrer to the bill was properly overruled. *Central Trust Co. v. Haynes*, 119.
4. *Objections. Ruling on demurrer. Amendments. Street railroads. Public nuisance. Abatement. Special damages. Eminent domain. Compensation. Additional servitude. Actual damages.*
- On an appeal from a judgment sustaining a demurrer to a bill only the bill and the last amendment thereto will be considered, since all questions eliminated from the bill by the various amendments thereto are waived, although such amendments were made in order to meet the rulings of the court in response to demurrers. *Williams v. Light & Ry. Co.*, 174.
5. *Elections. Contests. Remedies.*
- Under Code 1906, section 4186, providing that a person desiring to contest the election of another, returned as elected to an office within any county, may within twenty days file a petition in

PLEADING AND PRACTICE—Continued.

the office of the clerk of the circuit court of the county setting forth the ground upon which the election is contested and section 2439, providing that all the provisions of law on the subject of state and county elections shall govern municipal elections; a demurrer should be sustained to a *quo warranto* proceeding brought by a contesting candidate for the office of marshal of a town operating under the code municipal chapter, more than twenty days after the election and where the information charged that the election commissioners erred in counting the votes that he should have been inducted into office, since the procedure for contesting such an election provided by section 4186, Code 1906, is exclusive. *Loposser v. State ex rel.*, 240.

6. *Parties. Trial. Amendment. Lost instrument. Sufficiency of evidence.*

Where the administrator of the estate of a deceased brought suit upon a life insurance policy and it was subsequently discovered that the policy was payable to the wife and children of deceased, an amendment substituting them as plaintiffs should be allowed. *Colored Knights of Pythias v. Hill*, 249.

7. *Master and servant. Injuries to servant. Declaration.*

Where in a suit by the heirs of a servant for injuries caused by being struck by the head of a hammer, the declaration alleged that the master "negligently and carelessly furnished the said Joe Smith (plaintiff's fellow servant, who was striking a chisel which plaintiff's intestate held), with a sledge hammer to be used in cutting off the top of bolts, the handle of which hammer was defective in this, that it was shivered and shattered, which caused said sledge hammer to be and was loose on the handle." Such a declaration was not defective in not alleging that the hammer was loose on the handle or that the handle was shivered and shattered when furnished for use by the master. *Beddingfield v. Railroad Co.*, 311.

8. *Demurrer. Necessity to assign grounds. Statute.*

Where a declaration was defective in such a way as to be curable under Code 1906, section 808, by verdict, such defect could be availed thereof, under section 754, which provides that when a demurrer shall be interposed, the court shall not regard any defect in the pleadings, except such as shall be assigned for causes of demurrer, unless something so essential to the action or defense be omitted that judgment according to law and the right of the cause cannot be given. *Id.*

PLEADING AND PRACTICE.

PLEADING AND PRACTICE—Continued.

9. *Abatement and revival. Other action pending. Dismissal. Effect. Plea.*

While at the common law the rule was to sustain a plea in abatement of another suit pending, if it was true at the time the plea was filed, but the tendency of the later cases and a preponderance of authorities sustain the doctrine, that it is a good answer to the plea of pendency of a prior action for the same cause, that the former suit has been discontinued, whether the discontinuance be before or after the filing of the plea. Under this doctrine the plea will be overruled, unless the prior suit is pending at the time of the trial of the second. *Grenada Bank v. Bourke*, 342.

10. *Abatement and revival. Plea.*

Pleas in abatement on the ground of the pendency of another suit for the same cause of action are not favored by our courts. *Ib.*

11. *Judgment. Conformity to pleading. Deeds. Effect. Construction. Contracts. Intent. Signature and delivery. Presumption.*

Where, in a suit by a divorced wife against her former husband and another, she alleged in her bill, that during the time of their married life she and her husband acquired title to the land in controversy, the deed being made jointly in their names. That subsequently she joined her husband in a deed of the land to another. That she was induced to sign said deed, because she understood that it was necessary for her to do so in order that said deed should pass the interest of her said husband. But when she testified as a witness, complainant said that she was induced to sign the deed by the written agreement of her husband that she would receive one-half of the purchase price of the land. In such case the allegations of the bill did not correspond with the proof and she could not recover. *Isler v. Isler*, 419.

12. *Suggestion of error. Issue as to cost. Parties.*

Where, on suggestion of error after affirmance of a judgment providing that fees paid out of the county treasury to persons summoned as jurors should be taxed as cost in the cause, the only question presented is as to the taxation of such cost, and it appears that the controversy is between appellants and the county, and that appellees are not interested therein, the mandate will be withheld and the cause retained so that appellants may file an assignment of error raising such point and a copy thereof served on the attorney-general, and time will then be given to file briefs. *McCaleb v. McCaleb*, 486.

POSSESSION.

PLEADING AND PRACTICE—Continued.

13. *Insurance. Actions. Defenses. Forfeiture. Burden of proof and error. Harmless error. Instructions.*

In a suit by insured against an insurance company where the insurer defended on the ground that its policy had been forfeited because the insured secured other insurance in violation of its provisions and the insured replied admitting the existence of the additional policy, but denied that he knew of it or accepted it or that it had ever been in his possession, the burden of proving that the second policy was accepted by the insured was on the insurer, since the replication of assured was merely a denial of the essential averments of the insurer's plea under the general issue. *American Ins. Co. v. Crawford*, 493.

14. *Demurrer. Admission.*

On demurrer the court will assume that the declaration states the facts. *Harrison County v. Martone*, 592.

See ACTIONS—RIGHT AND CAUSE.

POSSESSION.

1. *Vendor and purchaser. Innocent purchasers. Notice. Adverse possession. Lost deed. Acts of ownership. Presumption. Quiet-
ing title. Evidence. Claim against state. Void tax deed. Tax-
ation.*

In a suit in equity to confirm title to land claimed by plaintiffs where the defendants claimed title to the land by adverse possession and plaintiffs claimed to be innocent purchasers for value without notice, the fact that such lands were indicated on an official county map as owned by defendants and the sectional index used by the county reflected all the conveyances affecting these lands and showed numerous deeds executed by defendant and his grantors from time to time and the fact that the property had been for a long time assessed to and the taxes paid by defendants, were sufficient to charge plaintiffs with notice of defendant's claim to the land. *Hewling v. Blake*, 225.

2. *Adverse possession. Lost deed. Acts of ownership. Presumption.*

Where defendants claim title to land under a lost deed from the president of the board of police made under an order of the board that the president execute such deed pursuant to the provisions of the act of October 19, 1852 (Laws called Sess. 1852, chapter 68), authorizing the sale of county lands for levee purposes, which order recites that defendant's remote predecessors in title had bought and paid for the land, the long continued possession of such land by defendants and their predecessors

PRINCIPAL AND AGENT—PROCESS.

POSSESSION—Continued.

accompanied by such acts of ownership as any reasonably prudent owner would exercise such as paying the taxes, cutting timber, leasing the land for pasturage and granting hunting and fishing privileges, raised a presumption of law that the original deed was executed and delivered. *Id.*

3. *Adverse possession. Claim against the state. Void tax deed. Statutes.*

In an action to quiet title to land, where plaintiff claimed title to the land which the county held in trust for levee purposes as provided for by Act of October 19, 1852, under a deed from the county, while defendant claimed title thereto by adverse possession under color of title of a subsequent tax deed, defendant's adverse possession after the year 1890 could not ripen into title, since by section 104, Constitution 1890, the running of the ten-year statute of limitations against the state was stopped. - *Id.*

4. *Forcible entry and detainer. Right to maintain action.*

A landlord who has leased his land for a term and placed his tenant in possession, cannot during the term maintain an action of unlawful entry and detainer, against a stranger who entered upon the premises after the term began. *Walton v. Wall*, 361.

PRINCIPAL AND AGENT.

Affidavits for principal. Ratification.

Although an agent making an affidavit in a claimant's issue, may not have been authorized to do so, yet the claimant has full power to ratify and adopt it. *Farrand Co. v. Huston*, 40.

PRINCIPAL AND SURETY.

Appeal and error. Supersedeas bond. Liability on.

Where all of the sureties but one had signed a *supersedeas* bond, the principal raised the amount, and then procured the signature of an additional surety, none of the sureties are liable for a greater sum than that originally fixed, notwithstanding Code 1906, section 1022, relating to judgments on bonds, for the one who signed after the penal sum had been raised, had the right to presume that the preceding sureties were for the raised sum and would contribute equally in payment of any amount awarded, while the original sureties, of course, were liable for the amount agreed upon. *Parsons-May-Oberschmidt v. Furr*, 795.

PROCESS.

Corporations. Notice to corporation. Sufficiency of compliance.

Under Code 1906, section 920, providing that process may be served on the agent of a foreign corporation within the county where

 PROPERTY AND PROPERTY RIGHTS—PUBLIC LANDS.

PROCESS—Continued.

suit is brought, regardless of the character of the agency, but requiring that the clerk, when return of the services is made, shall mail a copy of the process to the home office of the corporation by registered letter and file a certificate of such mailing, in the absence of which no judgment shall be valid, where summons was issued under the statute, but the clerk failed to mail the notice as required, a judgment by default against such corporation was erroneous there being no valid notice. *Household of Columbian v. Lundy*, 881.

PROPERTY AND PROPERTY RIGHTS.

Sale for nonpayment of taxes. School lands. Conveyance of timber.

Where the lessee of sixteenth-section land sold the timber thereon to one who had it separately assessed to it and paid the taxes thereon, but the owner of the leasehold interest in the land failed to pay the taxes on the land and it was sold for such taxes, and the purchaser of the timber obtained from the board of supervisors a conveyance of the timber. In such case the purchaser of the timber by paying its taxes thereon retained its rights to the timber, which was a sufficient basis for the contract with the board of supervisors, and it was therefore the owner of the timber. And the purchaser at the tax sale acquired only the soil but no right to the timber. *Caston v. Pine Lumber Co.*, 165.

PUBLIC LANDS.

1. *School lands. Conveyance by lessee.*

The right of the lessee of sixteenth-section lands to use the timber thereon is limited, but a valid conveyance of this right can be made which would transfer whatever rights the lessee had to use the timber. *Caston v. Pine Lumber Co.*, 165.

2. *Evidence. Secondary evidence. Title. Prima facie title.*

Under Code 1906, sections 1960-1961, providing for the admission of copies of records of the United States offices in evidence where plaintiff claimed land under a certificate of entry from the United States, claiming it a part of the public domain, the tract book of original entries, showing that the property had been reserved as school lands and accepted by the state was admissible to establish this fact. *Halloway v. Mules*, 532.

3. *Title. Prima facie title.*

Code 1906, section 1959, declaring that all certificates issued in pursuance of any act of Congress shall vest full legal title in the person to whom the certificate is granted, and shall be

PUBLIC LANDS.

PUBLIC LANDS—Continued.

received in evidence, saving the paramount right of other persons, merely announces a rule of evidence and establishes only a *prima facie* title which may be overcome and defeated by a superior or paramount title, and when a certificate of entry was issued by the United States land office to land which had been reserved as school land and accepted by the state, the entryman acquired no title, since the United States had none. *Ib.*

4. *Taxation. Sale of lands for taxes. When lands subject to taxation.*

Lands entered from the United States Government became subject to taxation by the state when the entryman received a final certificate adjudging him to be the owner thereof and before the receipt by him of the patent thereto. *Barksdale v. Grillcrist-Fordney Co.*, 561.

5. *Sale of timber. Setting aside. Sufficiency of bill.*

The board of supervisors has full power in the exercise of its discretion to sell timber on sixteenth-section land to the lessee of the land or any one else. *State v. Blodgett*, 768.

6. *Same.*

A bill by the state on the relation of the attorney-general to cancel a conveyance of timber on sixteenth-section land by the board of supervisors, to the lessee of the land for five hundred dollars, which gave to him twenty years in which to remove the timber and provided for a surrender of the remainder of the lease as soon as he had cut the timber, or at the expiration of twenty years, and which alleged that the timber was worth three thousand dollars; that the price was grossly inadequate; that there was no necessity to sell the timber; that it was sold by the board of supervisors because the lessee wished to purchase it, and not to promote the interest of the owners of the property, and that the board knew no one else could bid on it because of the lease to defendant, does not show fraud or collusion between the board and defendant, especially since the surrender of the remainder of the lease after the timber was cut, or at the end of twenty years, was a consideration for the conveyance, in addition to the money consideration. *Ib.*

7. *Lease. Sale of timber. Validity. Cutting logs. Power of board of supervisors. Trespass. Measure of damages.*

A conveyance of timber by a lessee of sixteenth-section land, whose unexpired term continues for fifty-five years, is valid against one who with notice thereafter purchased the right to cut all the timber growing on the land from the board of supervisors. *Lumber Co. v. Rowley*, 821.

 PUBLIC NUISANCE—RAILROADS.

PUBLIC LANDS—Continued.

8. *Lease. Cutting logs. Powers of board of supervisors.*

In such case the only control which the board of supervisors had over the timber was to prevent its being cut or destroyed, except in accordance with the rules of good husbandry, unless the right so to do should be purchased from it, and this right it could sell only to or with the consent of the lessee of the land, or to or with the consent of the person to whom the lessee had sold the timber and his assigns. *Id.*

9. *Same.*

In such case the board of supervisors had no authority either to cut or remove the timber, or to authorize appellee so to do. The only right which it did have was simply the right to sell to appellant or its assignee, the right to cut and remove the timber for uses not within the rules of good husbandry. *Id.*

PUBLIC NUISANCE.

See NUISANCE.

QUIETING TITLE.

Bill of complaint. Sufficiency.

Where in a bill of complaint to quiet title complainant deraigned title from the government through a chain of title to themselves and charged that defendant claimed title through a former suit for partition and sale which they claim was fraudulent and not by the then owners or their legal representatives, and that the sale thereunder conveyed no title, and that complainants were not parties to that suit, such a bill was not a bill of review, but states a good cause of action and a demurrer thereto should have been overruled. *Moore v. Luke*, 205.

RAILROADS.

1. *Privilege tax. Right to impose.*

The tax imposed by chapter 102, Laws 1912, is a privilege tax and not an *ad valorem* tax and may be imposed upon railroads doing a purely intra-state business. *Railroad v. State*, 290.

2. *Assessments. Classification. Commission.*

The railroad commission sits as a court of inferior jurisdiction. Its judgments in fixing assessments for *ad valorem* taxes and in classifying the several railroads for privilege tax purposes are binding upon both the state authorities and the railroad companies assessed, unless an appeal is prosecuted in the method prescribed by statute. *Id.*

RAILROADS.

RAILROADS—Continued.

3. *Commerce. Interstate commerce. Burden upon.*

Laws 1912, chapter 102, increasing privilege taxes on railroads, and fixing the privilege tax to be imposed on all railroads is not in violation of the Constitution of the United States, Act 1, section 8, as imposing a tax or burden upon interstate commerce by assessing taxes according to interstate earnings. *Id.*

4. *Constitutional law. Taxation. Due process of law.*

The state having power to impose license taxes, and Laws 1912, chapter 102, not working any burden on interstate commerce, such act cannot be held invalid under Constitution, U. S. Amend. 14, as depriving railroads, which also run into other states, of their property without due process of law, or denying them equal protection of the laws, on the theory that in classifying such roads for taxation their interstate earnings can be considered. *Id.*

5. *Waters and water courses. Flowage. Construction of railroads.*

It is the duty of railroad companies not only to properly construct, but properly to maintain, their roadbeds with sufficient openings to permit the flow of surface water and where a railroad company originally constructed its roadbed with a long trestle under which the surface waters followed their natural flow, but in the course of time gravel and other debris from the tracks washed under the trestle so as to form an obstruction, thus preventing the flow of surface water and inundating the adjacent lands, the company was liable. *Railroad Co. v. Scott*, 443.

6. *Defective appliances. Constitutional provisions.*

A yard foreman switchman does not come within the excepted class of employees. Under section 193 of the Constitution which provides that "knowledge by any employee injured of the defective, or unsafe character or condition of any machinery, ways, or appliances shall be no defense to an action for injury caused thereby, except as to conductor or engineers in charge of dangerous or unsafe cars on engines voluntarily operated by them. *Gulf & S. I. R. Co. v. Dana*, 666.

7. *Master and servant. Fellow servant. Statute. Injury to employee. Neglect of fellow servant. Abrogation of doctrine.*

A railroad equipped with cars propelled by steam and run on tracks including a "skidder" operated by steam, to draw logs to the cars by means of a cable, and a "ladder," which was operated by steam, and to load the logs on the cars, is such a railroad as is contemplated by Laws 1908, chapter 195, section 1, which provides that "every employee of a railroad corporation, and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever propelled

RAILROADS.

RAILROADS—Continued.

by the dangerous agencies of steam, electricity, gas, gasoline, or lever power and running on tracks, shall have the same rights and remedies for any injury suffered by him from the act or omission of such railroad corporation or others or their employees as are allowed by law to other persons not employed. *Hunter v. Ingram-Day Lumber Co.*, 744.

8. *Telegraphs and telephones. Construction of lines. Railroad's right of way. Servitude. Trespasser.*

Where a telephone company acquired by condemnation a right of way for its line of poles over the right of way of a railroad company, it had no right to lease to a telegraph company the right to place one of its wires on the already erected poles of such telephone company without the consent of the railroad company, since the construction of the telegraph line would constitute an additional servitude on the railroad's right of way. *Tel. & Cable Co. v. Gulf & S. I. R. Co.*, 770.

9. *Same.*

In such case the telegraph company in stringing its line on the poles of the telephone company was a mere trespasser and the railroad company had the right to remove from its premises such wire, using only such force and means as was reasonably necessary to preserve its own property. *Ib.*

10. *Same.*

In such case where the railroad company cut the telegraph wire in numerous places in such a manner as to render it practically valueless, the telegraph company had a right to recover from it damages sufficient to remind the railroad company of the fact that it committed a wrong, and to compensate it for the injury sustained. *Ib.*

11. *Carriers. Carriage of passengers. Special trains.*

While a railroad company had for several years allowed passengers to board its excursion trains to the state fair at a flag station, it may change its rules and refuse to receive passengers on such special trains, except at its agency stations where tickets could be procured, and a plaintiff cannot complain that he was refused passage on such special train at a flag station, though the train had stopped when flagged at such a station. *Gulf & S. I. R. Co. v. Dixon*, 800.

12. *Injuries to stock. Case for jury.*

Where several mules were killed by the running train of a railroad company, and the engineer testified that when killed the mules were all in a bunch, but the evidence showed that they were killed several hundred yards apart, the matter of liability should have been left for the jury. *Dickerson v. Railroad*, 898.

See ACTIONS—RIGHT AND CAUSE.

RAPE—RECEIVERS.

RAPE.

1. *Criminal law. Trial. Instructions.*

In a trial for assault with intent to commit rape an instruction that the strongest proof of the good reputation of the prosecutrix for virtue and chasity is the proof that no one had heard her reputation in this particular discussed before the alleged assault, was erroneous, because, besides being an instruction upon the weight of the evidence, the court treated the state's evidence as proof. *Welch v. State*, 148.

2. *Same.*

Such an instruction was further erroneous in assuming that no one had heard the reputation of the prosecutrix discussed in this particular, especially when a number of defendant's witnesses testified to the contrary. *Ib.*

RECEIVERS.

1. *Property affected. Time of appointment. Assets. Claim of third persons.*

The right of a receiver became fixed at the date of his appointment, and his title accrues at that time, and liens and priorities of creditors, properly acquired before the appointment of the receivers, will not be disturbed by the receiver. *Hardware Co. v. Harvester Co.*, 783.

2. *Same.*

The receiver represents the creditors as well as the stockholders, and holds the property for the benefit of both, he is trustee for both, and as trustee for the creditors can maintain and defend actions which the corporation could not. *Ib.*

3. *Assets. Claims of third persons.*

Under Code 1906, section 4784, providing that if a person transacts business in a company name, and fails to disclose the name of his partner by a conspicuous sign at the house where the business is transacted, the property used or acquired in the business shall, as to the creditors of such person, be liable to his debts. Where the goods of a harvester company were placed in the storehouse of a hardware company which acted as its agent, behind the sign of the hardware company, the business being conducted by the hardware company and the goods apparently formed a part of the regular stock of merchandise, there being no sign of the harvester company except an advertisement of the hardware company that it carried the products of the harvester company as part of its

RECEIVERS—Continued.

stock in trade. In such case the property belongs to the hardware company as to creditors, and a receiver of the hardware company is entitled to possession thereof, not withstanding that previous to the appointment of the receiver the harvester company had instituted an action for the property and had given bond and taken possession of the same. *Id.*

RECORDS.

See APPEAL AND ERROR.

RELEASE.

Limited release. Effect. Master and servant. Injuries to servant. Pleading. Declaration. Cure by verdict. Statute of jeofails. Demurrer. Necessity to assign grounds. Statute.

Where the release of an injured servant to the master, was not a general release, but a limited one, covering only such damages as resulted to him from the bruising of his shoulder, such a release did not cover other injuries which were unknown to the parties at the time the release was executed. *Beddingfield v. Railroad Co.*, 311.

REMAINDERMEN.

See REMAINDERS.

REMAINDERS.

1. *Action. Limitations. Running of statute. Remaindermen. Infants. Property. Sale. Power of court. Limitations of actions.*

Where land was devised by a testator in trust to his daughter for life with remainder to his minor grand-children and such land was wrongfully sold during the minority of the remaindermen and while the life tenant was living, the statute of limitations did not run against the remaindermen before the termination of the life estate, as their right to possession did not accrue until the death of the life tenant. In such case the remaindermen may have the deed cancelled, and upon becoming entitled to possession, may recover the land, although it was sold under an erroneous order of the court; Code 1906, section 3122, fixing a two year period under which land sold by order of court may be recovered, having no application. *Clark v. Foster*, 543.

2. *Limitation of actions. Running of statutes. Remaindermen.*

Where land was devised in trust to one for life, with remainder to another and was wrongfully sold, the fact that the trustee's rights were barred by limitation will not bar the remaindermen from securing cancellation of the deed, under Code 1906, section

REPLEVIN—REWARDS.

REMAINDERS—Continued.

3123 (Code 1892, section 2761), providing that the running of the statute of limitations against the trustee shall bar the beneficiary, where the life tenant is still alive, for until her death the remaindermen have no right to possession, and the trustee's failure to sue could not bar them. *Id.*

REPLEVIN.**1. Sale of property. Collateral attack. Defective trust deed. Title.**

Where P. sold certain machinery to S. and took a deed of trust on the same to secure a part of the purchase money and S. failed to pay, and the trustee under the trust deed instituted replevin under which the property was seized by the sheriff and sold to P., under Code 1906, section 4229, providing for the sale of property too expensive to keep, and after the levy under the replevin writ, execution was issued on a judgment in an action by D. against S. and placed in the hands of the sheriff, and P. filed his claimant's affidavit in the execution proceedings, and D., contended that the trustee had not been legally appointed and that the description of the property in the trust deed was void for uncertainty. In such case D. could not question the validity of the judgment in the replevin suit; and as the replevin writ and the sale thereunder were void on the face of the record, and since P's lien was transferred from the property to the proceeds of the sale, P's title acquired by the sale was good as against D. *Pearce v. De Graffenreid*, 465.

2. Verdict. Form. Restoration of property. Statutes.

Under Code 1906, section 4233, which provides that the judgment for plaintiff in replevin, where defendant gives bond, shall be for the restoration of the property, with damages, a judgment against defendant and the sureties on his bond for damages only is erroneous. *Miller v. Griffin*, 535.

REWARDS.**1. Sufficiency of services. Arrest and detention in another state. Construction of statute.**

In an action by plaintiff against a county for the statutory reward of one hundred dollars for arresting a fleeing homicide, where plaintiff had initiated the search in the nighttime and was on his way to arrest the fleeing homicide some nine miles from the scene of killing and did make the arrest and the prisoner was afterward convicted, the fact that he was joined in the search by an officer to whom he turned over the prisoner after he had arrested him and who assisted him in handcuffing the prisoner,

REWARDS—Continued.

did not prevent plaintiff from being entitled to the reward. *Harrison County v. Hurst*, 716.

2. *Performance of service. Arrest in another state.*

When plaintiff arrested a fleeing homicide in another state and notified the sheriff of the county in Mississippi where the homicide occurred of such arrest, and held the prisoner until the sheriff arrived, when he turned the prisoner over to him and the sheriff brought him back for trial, the fact that he so delivered the prisoner and did not incur any expense in returning him to the state did not destroy his right to the statutory penalty for arresting a fleeing homicide. *Ib.*

3. *Construction of statute.*

The statute providing for a reward for arresting a fleeing homicide must be given a liberal construction in aid of parties making such arrest. *Ib.*

4. *Statutory rewards. Fleeing homicide.*

Where a negro employee in a wholesale grocery company got into a controversy with and cut another negro to death and the other negro employees surrounded him and demanded that he give up his knife and the slayer backed to an entrance and refused this demand, when claimant, one of the white bosses, appeared and ordered the slayer to give up his knife and go to a dressing room, take off his working clothes and stay there until an officer came, all of which the slayer did, in such case claimant was not entitled to the statutory reward for arresting a fleeing homicide. *Harrison County v. McCaleb*, 723.

ROAD DISTRICTS.

1. *Highways. Districts. Change of organization. Notice. Statutes.*

A road district which has come under Laws 1914, chapter 176, for construction of roads by issuance of bonds and has made an issue which is outstanding, cannot also come under chapter 174, Laws 1914, for construction of roads by the proceeds of taxes, since section 14, Laws 1914, only authorizes the placing under that act districts "which have not issued bonds." *Jones v. Newton County*, 328.

2. *Same.*

Section 1, chapter 174, expressly provides that a road district shall not be created under the provisions of that act without thirty days notice of the intention of the board of supervisors to create such district and if twenty-five per cent of the qualified electors, petition against the creation, then such district cannot be created, until a majority of the qualified voters so declare in

ROAD DISTRICTS—Continued.

an election held for that purpose and an order of the board establishing such district, passed without any such notice or election is void. *Ib.*

SALES.

1. *Construction. Offer and acceptance.*

Where a contract is to be formed by means of an offer by one party and the acceptance thereof by the other, there must be an unconditional acceptance of the offer, not only must the acceptance be unconditional but it must be identical with the terms of the offer. It must not vary from the proposal, either by way of omission, addition, or alteration. If it does, neither party is bound. *Sutter-Van Horn Co. v. Telephone Co.*, 169.

2. *Quantity delivered. Right of buyer.*

Where a purchaser bought a job lot represented to contain not more than four dozen hats of different styles and values, and on being received, it was found that there was a greater number than represented and there was no way to identify and separate the goods bought from the goods not bought. In such case it was incumbent on the purchaser to reject the entire shipment or to receive all and pay for same. *Rubenstein v. Millinery Co.*, 213.

SCHOOLS AND SCHOOL DISTRICTS.

1. *County school boards. Meetings. Statutory provisions. Consolidated districts. School taxes. Enjoining collection.*

Code 1906, section 4512, provides that, the county superintendent shall be president of the school board, and shall convene it annually, prior to the first day of August, to define the boundaries of the school districts of the county outside of the separate school districts, or to make alterations therein, and to designate the location of the schoolhouse in each district if not already located. The only effect of that section is to require the board of education to hold a meeting before the 1st day of August in each year for the purpose of considering the matters named in said section. This work is required to be done before the 1st day of August, and this is all. It does not prevent the board from having repeated meetings before the 1st day of August to carry out the provisions of this section. *Purvis v. Robinson*, 64.

2. *Consolidated school districts. School taxes. Statutory provisions.*

A school district established under section 3, chapter 253, Laws 1912, must contain an area of twenty-five square miles but it need not embrace twenty-five full sections, in order that the specified tax may be levied. *Ib.*

SEDUCTION—SHIPPING.

SEDUCTION.

Right of parents. Action for damages. Bar by bastardy. Proceeding.

A proceeding against a defendant for bastardy under Code 1906, chapter 15 which was settled by the payment of two hundred dollars to the prosecutrix did not bar an action by her father for damages for her seduction. *Delancey v. Byrd*, 598.

SELF-DEFENSE.

See ASSAULT.

SERVICE.

See JURISDICTION.

SET-OFF AND COUNTERCLAIM.

Rights of assignee. Statute.

Under our anti-commercial statute, Code 1906, section 4001, providing that all notes and other writings for the payment of money or other thing may be assigned by indorsement, and the assignee may maintain such action thereon in his own name as the assignor might have maintained and that in all actions on such writings defendant shall be allowed the benefit of all set-offs had against them previous to notice of assignment, where plaintiff railroad, in course of purchasing lumber under contract which required the seller to pay the freight to points on its line, had paid freight charges for the seller amounting to one thousand eight hundred and ninety-four dollars, and which owed the seller the purchase price of lumber amounting to two thousand nine hundred dollars; in such case the railroad, as against a bank standing in the position of an assignee of the invoices, after the seller's bankruptcy was entitled to set off such freight advances against the invoices since the bank at all times stood in the shoes of the seller. *Railroad Co. v. McComb City*, 676.

SHIPPING.

1. *Demurrage. Liability. Delay in loading. Contract. Construction of charter party. Waiver by acceptance of cargo. Trial. Peremptory instructions. Consideration of evidence.*

In a suit to recover demurrage paid to the master of a vessel for delay in the loading of lumber, which delay was alleged to have been caused by the wrongful acts of defendant's inspector, in refusing to accept certain lots of lumber tendered for inspection, where it did not appear that such acts delayed the loading, or that they were willfull and reckless, plaintiff was not entitled to judgment. *Trading Co. v. Lumber Co.*, 31.

STATUTES AND STATUTORY CONSTRUCTION.

SHIPPING—Continued.

2. *Demurrage. Contract. Construction of charter party.*

Where in an action to recover demurrage paid to the master of a vessel for delay in loading lumber, it was shown that plaintiff entered into a written contract with defendant by the terms of which plaintiff was to sell and deliver to defendant a cargo of lumber "f. o. b., pier Gulfport, for November loading" and defendant requested that loading be delayed until December to which plaintiff replied, that it would be inconvenient, and that it could not agree to load in December, but afterwards received a copy of the charter party, and arranged a berth for the vessel with full knowledge of its provisions, plaintiff thereby acquiesced in the change of date and was bound by the charter party, so that it was not entitled to recover demurrage paid on account of delay in loading caused by the change. *Ib.*

3. *Demurrage. Delay in loading. Waiver of acceptance of cargo.*

A right of action for damages for breach of contract arises on the failure of the seller to deliver the goods as agreed on for a delay in delivery. In the case of a partial delivery an action for damages will live for the part not delivered, the acceptance of the partial deliveries being no waiver of the breach. *Ib.*

STATUTES AND STATUTORY CONSTRUCTION.

1. *Homestead. Laws. Construction.*

Homestead laws are liberally construed in favor of the exemptionist, but never as a pretext to claim that which does not really and substantially exist. *Mounger v. Gandy*, 133.

2. *Peace bond. Effect of appeal bond. Breach of the peace.*

The peace bond authorized by Code 1906, section 1561, is an additional penalty which the court may or may not impose upon persons who have been convicted of a criminal offense. The general sections of the Code preceding section 1561, relating to peace bonds have no application to the peace bond provided for under this section. *City of Jackson v. Belew*, 243.

3. *Reward. Construction of statute.*

The statute providing for a reward for arresting a fleeing homicide must be given a liberal construction in aid of parties making such arrest. *Harrison County v. Hurst*, 716.

4. *Amendment. Reference to title. Constitutionality.*

Laws 1912, chapter 232, entitled "An act to amend and enlarge section 3074, Code 1906, and to extend and enlarge the provisions of same, so as to provide more effective liens for subcontractors, laborers and others employed," section 1 being headed "Liens of Laborers and Subcontractors Extended"—Code

STATUTE OF FRAUDS.

STATUTES AND STATUTORY CONSTRUCTION—Continued.

amended utterly fails to comply with section 61 of the constitution of the state, which reads: "No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived shall be inserted at length." This act is unconstitutional because it fails to insert at length, in chapter 232, section 3074 of the Code of 1906, as amended. *Seay v. Plumbing & Metal Co.*, 834.

5. *Taxation. Exemption. Construction of statutes.*

Statutes exempting persons and property from taxation must be strictly construed, but there is a relaxation of the rule in the case of statutes of exemptions applicable to religious and educational institutions, and the supreme test is the intent of the legislature. *Adams Co. v. Diocese of Natchez*, 890.

6. *Construction. Exemptions. "And."*

In order to obtain the policy and intent of the statute, the disjunctive "or" should be used and read into the act, in the place of the conjunctive "and," conjoining "fraternal and benevolent purposes" referred to in the last part of this provision or section 4252, Code 1906, so as to exempt property of religious institutions. *Ib.*

7. *Same.*

Whenever necessary to effectuate the obvious meaning of the legislature, conjunctive words may be construed as disjunctive, and *vice versa*. *Ib.*

STATUTE OF FRAUDS.

1. *Tenancy from year to year. Landlord and tenant. Termination of tenancy. Notice to quit. Necessity.*

Where a tenant entered upon the rented premises in pursuance of an oral agreement and as a lessee of the landlord and executed and delivered his five annual rent notes and paid the periodical rent agreed upon for four years without question, in such case regardless of the statute of frauds, a periodical tenancy was created, and the tenant became a tenant from year to year, and a purchaser who bought the land during the last year of the term could not dispossess the tenant without giving two months' notice in writing to terminate the tenancy as required by Code 1906, section 2882. *Scruggs v. McGehee*, 10.

2. *Parol reservation of interest in land.*

On the sale of land a parol reservation by the vendor of the right to remove a fixture thereon, was void under the statute of frauds, as to an innocent purchaser from the vendee thereof. *McLeod v. Clark*, 861.

 STATUTE OF LIENS—STATUTE OF LIMITATIONS.

STATUTE OF FRAUDS— Continued.

 3. *Agreements not to be performed within one year.*

Under the provisions of the statute of frauds, providing that contracts not to be performed within one year from the making thereof must be in writing, the possibility of the death of the promisor within one year would not take the contract out of the statute unless the death leaves the contract duly performed, the rule being, if the death of the promisor within the year would merely prevent full performance of the agreement, it is within the statute; but if his death would leave the agreement completely performed and its purpose fully carried out, it is not. *Edwards & Sons v. Farve*, 864.

 4. *Agreements not to be performed within one year.*

In a suit on a contract for the delivery of ninety thousand logs at the rate of two hundred per day, an instruction that a suit cannot be maintained on an oral contract which was not to be performed within one year and if the jury believed that the logs could not be handled within one year at the rate of two hundred a day they shall find for the defendant, should not have been refused, as the contract was within the statute of frauds since the clause "not to be performed within one year from the making thereof" means to include any agreement which, by fair and reasonable interpretation of the term used by the parties, and in view of all the circumstances existing at the time, does not admit of its performance, according to its language and intention, within a year from the time of its making. *Ib.*

STATUTE OF LIENS.

See WITNESS.

STATUTE OF LIMITATIONS.

 1. *Wills. Deeds. Life estate. Adverse possession under life tenant. Vendor and purchaser. Bona-fide purchaser. Notice. Record destroyed by fire. Estoppel. Failure to assert title. Ejectment. Common source of title.*

Under such a deed the statute of limitations did not commence to run against the grantors until the death of both the grantors. *Myers v. Vivertt*, 334.

 2. *Remainder. Action Limitations. Running of statute. Remaindermen. Infants. Property. Sale. Power of court. Limitations of actions.*

Where land was devised by a testator in trust to his daughter for life with remainder to his minor grand-children and such land was wrongfully sold during the minority of the remaindermen

 STREET RAILROADS—SUPERSEDEAS BOND.

STATUTE OF LIMITATIONS—Continued.

and while the life tenant was living, the statute of limitations did not run against the remaindermen before the termination of the life estate, as their right to possession did not accrue until the death of the life tenant. In such case the remaindermen may have the deed cancelled, and upon becoming entitled to possession, may recover the land, although it was sold under an erroneous order of the court; Code 1906, section 3122, fixing a two year period under which land sold by order of court may be recovered, having no application. *Clark v. Foster*, 543.

STREET RAILROADS.

Public nuisance. Abatement. Special damage.

The laying of an additional track in a street does not constitute a public nuisance, from which abutting property owners sustain such special damage as will entitle them to the abatement thereof. *Williams v. Light & Ry. Co.*, 174.

SUMMONS.

See JURISDICTION.

SUNDAY.

Affidavits. Date. Validity.

An affidavit of a third person claiming property levied upon under execution, is valid though dated on Sunday, if in fact it was not made on that day. *Farrand Co. v. Huston*, 40.

SUPERSEDEAS BOND.

1. *Judgment. Conclusiveness. Matters concluded. Appeal and error. Statute. Construction. Principal and surety. Liability on.*

Where in a suit to enjoin a sale under a deed of trust, the grantors appealed and gave a *supersedeas* bond and in the appellate court the sureties on the bond moved to discharge it, because they had been misled into signing it, and had, before the bond was approved, notified the clerk not to approve it, and the supreme court declined to entertain the motion on the ground that such matters could not there be adjudicated in the first instance; in such case such ruling did not preclude the sureties from subsequently filing a bill in the lower court to vacate the bond and annul the judgment thereon. *Parsons-May-Oberschmidt v. Furr*, 795.

2. *Appeal and error. Statute. Construction.*

Under Code 1906, section 1022, providing that "when a bond, recognition, obligation, or undertaking of any kind shall be executed in any legal proceeding, or for the performance of any public

SUPERSEDEAS BOND—Continued.

contract, or for the faithful discharge of any duty, it shall inure to the person to whom it is designed by law as a security, and be subject to judgment in his favor, no matter to whom it is made payable, nor what is its amount, nor how it is conditioned, and the persons executing such bond or other undertaking shall be bound thereon and thereby, and shall be liable to judgment or decree on such bond or undertaking as if it were payable and conditioned in all respects as prescribed by law, if such bond or other obligation or undertaking had the effect in such proceeding or matter which a bond or other undertakings payable and conditioned as prescribed by law, would have had, and where any such bond or undertaking is not for any specified sum, it shall bind the parties executing it for the full amount for which any bond or undertaking might have been required in the state of case in which it was given." Where a *supersedeas* bond is for a lesser or greater amount than that prescribed by law, the court is not authorized to render judgment for any amount which might have been required, but shall only render judgment for such amount as is authorized by the term of the bond and rules of equity. *Id.*

2. Principal and surety. Appeal and error. Liability on.

Where all of the sureties but one had signed a *supersedeas* bond, the principal raised the amount, and then procured the signature of an additional surety, none of the sureties are liable for a greater sum than that originally fixed, notwithstanding Code 1906, section 1022, relating to judgments on bonds, for the one who signed after the penal sum had been raised, had the right to presume that the preceding sureties were for the raised sum and would contribute equally in payment of any amount awarded, while the original sureties, of course, were liable for the amount agreed upon. *Id.*

See JUDGMENT.

TAXES AND TAXATION.

1. Enjoining collection. Statutory provisions.

Section 533, Code 1906 affords the only authority for equity jurisdiction of suits to enjoin the collection of taxes levied or attempted to be collected without authority of law. *Purvis v. Robinson*, 64.

2. Enjoining collection. Grounds.

Under Code 1906, section 533, providing that the chancery court shall have jurisdiction of suits by taxpayers to restrain the collection of any taxes levied without authority of law, where a

TAXES AND TAXATION.

TAXES AND TAXATION—Continued.

railroad commission, after investigating the question of ownership of a telegraph line along a railroad right of way, assessed it against the telegraph company and that company took no appeal to the circuit court by *certiorari*, the chancery court had no jurisdiction to enjoin the collection of the tax so assessed, even though the telegraph company did not in fact own such line, since the judgment of the railroad commission was valid on its face and whether justified or not, the exclusive remedy was by *certiorari* to the circuit court. *Telegraph Co. v. Kennedy*, 73.

3. *Action to confirm tax title. Pleading. Cure. Statutes.*

Where a bill to confirm a title purchased at a tax sale, alleged that one of the defendants was claiming title and had executed a deed of trust to the other defendant, that the property had been legally assessed to an unknown owner for taxes due the county, that after the collector's failure to sell for delinquent taxes the county board of supervisors by order entered on its minutes directed the sheriff to sell it on a certain date, that after due advertisement the collector made the sale on such date and executed a deed to the purchaser at the expiration of two years and complainant had title from such purchaser. The defects if any there were in the allegations of the bill of complaint were cured by sections 4332 and 4367, Code 1906, and a demurrer to the bill was properly overruled. *Central Trust Co. v. Haynes*, 119.

4. *Property taxable. Growing timber. Sale for non-payment of taxes. School lands. Conveyance of timber. Rights of purchaser.*

One person may own the land, and another may own the timber thereon, and the land may be separately assessed for taxation to the owner thereof, and the timber growing thereon may also be assessed for taxation to the purchaser of same. *Caston v. Pine Lumber Co.*, 165.

5. *Sale for nonpayment of taxes. School lands. Conveyance of timber.*

Where the lessee of sixteenth-section land sold the timber thereon to one who had it separately assessed to it and paid the taxes thereon, but the owner of the leasehold interest in the land failed to pay the taxes on the land and it was sold for such taxes, and the purchaser of the timber obtained from the board of supervisors a conveyance of the timber. In such case the purchaser of the timber by paying its taxes thereon retained its rights to the timber, which was a sufficient basis for the contract with the board of supervisors, and it was therefore the owner of the timber. And the purchaser at the tax sale acquired only the soil but no right to the timber. *Id.*

TAXES AND TAXATION.

TAXES AND TAXATION—Continued.

6. *Tax deed. Validity.*

A tax deed to land held by the county in trust for levee purposes as provided by the Act of October 19, 1852, was void, since such land while so held was not subject to sale for taxes. *Hewling v. Blake*, 225.

7. *Railroads. Privilege tax. Right to impose.*

The tax imposed by chapter 102, Laws 1912, is a privilege tax and not an *ad valorem* tax and may be imposed upon railroads doing a purely intra-state business. *M. & C. R. Co. v. State*, 290.

8. *Railroads. Assessments. Classification. Commission.*

The railroad commission sits as a court of inferior jurisdiction. Its judgments in fixing assessments for *ad valorem* taxes and in classifying the several railroads for privilege tax purposes are binding upon both the state authorities and the railroad companies assessed, unless an appeal is prosecuted in the method prescribed by statute. *Id.*

9. *Insurance companies. Taxes on receipts. Cash dividends. Paid under policy contracts.*

In a suit by the insurance commissioner of the state against an insurance company for taxes on the annual premium receipts received by the company during stated periods, under Code 1906, section 2629, as amended by Laws 1912, chapter 227, providing that all life insurance companies or associations shall pay annually a tax of two and one-fourth per cent. upon the gross amount of premium receipts, less death claims, matured endowments, and cash dividends paid under policy contracts during the year; where a policyholder's dividend or share in the surplus earnings of a mutual insurance company were not, in fact, paid to the policyholder, but at their request were deducted from premiums due the policyholder, the policyholder simply paying the difference between the amount of the dividend and the amount of the premium, the money so distributed among the policyholders was "cash dividends paid under policy contracts," since what was done was equivalent to a payment of the dividend to the policyholder in cash, and its immediate return to the company in part payment of the premium due. *Life Ins. Co. v. Ins. Commissioner*, 402.

10. *Highways. Road taxes. Dispositions.*

While Code 1906, sections 4433 and 4469, relating to taxes collected directly for working public roads, provides that one-half of the tax collected on property within a municipality shall be paid to such municipality for street purposes, yet where under Law 1901, chapter 150, the board of county supervisors

TAXES AND TAXATION.

TAXES AND TAXATION—Continued.

issued bonds for road purposes, and levied and collected an *ad valorem* tax on all taxable property of the county, including property in a town which worked its own streets, the town was not entitled to one-half of the taxes collected upon urban property, since such tax was levied in the interest of the bondholders and must be paid to the owners of the bonds. *Waveland v. Hancock County*, 471.

11. *Sale of lands for taxes. When lands subject to taxation.*

Lands entered from the United States Government became subject to taxation by the state when the entryman received a final certificate adjudging him to be the owner thereof and before the receipt by him of the patent thereto. *Barkadale v. Gillcrist-Fordney Co.*, 561.

12. *Assessment. Reduction. Proceedings. Personal Property. To whom assessable.*

Under Code 1906, section 4312, so providing, where there is an overvaluation of property assessed known to be such and also a clerical error in the assessment rolls, the board of supervisors have the power at any time on the application of a party interested, to correct the assessment. *Adams v. Dale*, 671.

13. *Personal property. To whom assessable.*

Personal property belonging to an estate held in trust, should be assessed to the trustee in his representative capacity at his residence or domicile. *Id.*

14. *Assessments. Charges.*

Where lands are assessed to two joint owners, the tax collector cannot change the original assessment and apportion a separate half interest to each owner and having paid one-half of the assessment, sell the undivided interest of the other party upon his failure to pay one-half the tax and such a sale is void. *Fountain v. Joullian*, 812.

15. *Assessment. Validity of statute.*

Laws 1908, chapter 239, which empowers the board of supervisors of Lincoln county to order an assessment of lands for the year 1908; said assessment to be made in all respects as required by law for regular land assessments and to be in lieu of the last regular assessment, does not violate section 112 of the state constitution, providing that "taxation shall be uniform and equal throughout the state. Property shall be assessed for taxes under general laws, and by uniform rules, according to its value." *Horton v. King*, 859.

TAXES AND TAXATION—Continued.

16. *Exemptions. Charitable societies. Construction of statutes. Exemptions.*

Under Code 1906, section 4251, cl. d., providing that, all property real or personal, belonging to any religious or charitable society and used exclusively for the purpose of such society and not for profit, shall be exempt from taxation and under section 4252, providing that all the property, real and personal, and the revenues derived therefrom belonging to any religious or charitable society or benovolent order on the lodge system, where no dividends are declared, and where the revenues thereof are used for fraternal and benevolent purposes, shall be exempt from all state, county and municipal taxes, the lands of an incorporated catholic diocese the rents which are used to maintain orphans' homes are exempt; the two sections not being in conflict, the latter section merely extending the exemption of the former. *Adams Co., v. Diocese of Natchez*, 890.

17. *Exemption. Construction of statutes.*

Statutes exempting persons and property from taxation must be strictly construed, but there is a relaxation of the rule in the case of statutes of exemptions applicable to religious and educational institutions, and the supreme test is the intent of the legislature. *Ib.*

TELEGRAPH AND TELEPHONES

1. *Construction of lines. Railroad's right of way. Servitude. Trespasser.*

Where a telephone company acquired by condemnation a right of way for its line of poles over the right of way of a railroad company, it had no right to lease to a telegraph company the right to place one of its wires on the already erected poles of such telephone company without the consent of the railroad company, since the construction of the telegraph line would constitute an additional servitude on the railroad's right of way. *Tel. & Cable Co. v. Gulf & S. I. R. Co.*, 770.

2. *Same.*

In such case the telegraph company in stringing its line on the poles of the telephone company was a mere trespasser and the railroad company had the right to remove from its premises such wire, using only such force and means as was reasonably necessary to preserve its own property. *Ib.*

3. *Same.*

In such case where the railroad company cut the telegraph wire in numerous places in such a manner as to render it practically

TITLES.

TELEGRAPH AND TELEPHONES—Continued.

valueless, the telegraph company had a right to recover from it damages sufficient to remind the railroad company of the fact that it committed a wrong, and to compensate it for the injury sustained. *Id.*

See ESTOPPEL.

TITLES.

1. *Taxation. Property taxable. Growing timber. Sale for nonpayment of taxes. School lands. Conveyance of timber. Rights of purchaser.*

One person may own the land, and another may own the timber thereon, and the land may be separately assessed for taxation to the owner thereof, and the timber growing thereon may also be assessed for taxation to the purchaser of same. *Caston v. Pine Lumber Co.*, 165.

2. *Replevin. Sale of property. Collateral attack. Defective trust deed. Title.*

Where P. sold certain machinery to S. and took a deed of trust on the same to secure a part of the purchase money and S. failed to pay, and the trustee under the trust deed instituted replevin under which the property was seized by the sheriff and sold to P., under Code 1906, section 4229, providing for the sale of property too expensive to keep, and after the levy under the replevin writ, execution was issued on a judgment in an action by D. against S. and placed in the hands of the sheriff, and P. filed his claimant's affidavit in the execution proceedings, and D., contended that the trustee had not been legally appointed and that the disposition of the property in the trust deed was void for uncertainty. In such case D. could not question the validity of the judgment in the replevin suit; and as the replevin writ and the sale thereunder were void on the face of the record, and since P's lien was transferred from the property to the proceeds of the sale, P's title acquired by the sale was good as against D. *Pearce v. De Graffenreid*, 465.

3. *Receivers. Property affected. Time of appointment. Assets. Claim of third persons.*

The right of a receiver became fixed at the date of his appointment, and his title accrues at that time, and liens and priorities of creditors, properly acquired before the appointment of the receivers, will not be disturbed by the receiver. *Hardware Co. v. Harvester Co.*, 783.

TORTS—TRIAL

TORTS.

Actions. What law governs. Damages. Punitive damages.

The law of the state where a tort occurs governs the right of action. *Telegraph Co. v. Jennings*, 673.

TRESPASSERS.

See RAILROADS.

TRIAL

1. *Peremptory instructions. Consideration of evidence.*

The evidence of the plaintiff must be, upon its application for a peremptory instruction, taken most strongly against it. *Trading Co. v. Lumber Co.*, 31.

2. *Instruction. Argument of counsel.*

Every litigant in a civil case has a vested constitutional right to have his case presented to the jury by counsel, and to have the argument of his counsel heard by the jury, untrammelled by any suggestions from the court that are calculated to minimize the force or cheapen the worth of legitimate argument and an instruction which states that the unsworn statements and arguments of attorneys are neither evidence nor law, and can not be considered, while technically accurate, intimates that the attorneys may make statements not supported by the evidence, and practically directs the jury to disregard their arguments and is to be condemned. *O'Leary v. Railroad*, 46.

3. *Verdict. Sufficiency.*

In a suit against two defendants, a verdict that "we the jury, find for the plaintiff and assess his damages at five hundred dollars," was sufficiently definite. *Callahan v. Rayburn*, 107.

4. *Peremptory instruction. Right to. Libel and slander. Actions. Evidence.*

Where the evidence is conflicting a peremptory instruction should not be given. *Life & Acc. Ins. Co. v. DeVance*, 196.

5. *Instruction. Error.*

Where in an action for slander, plaintiff's declaration contained two counts and in the first count it was charged that the slanderous words were spoken by defendant's soliciting agent and in the second count the slanderous words are charged to have been spoken by defendant's superintendent, and the first count not being supported by the evidence, the court instructed the jury to find for the defendant on that count, it was error for the

TRIAL—Continued.

court to then instruct the jury that if they believed from the evidence that both said agents or either of them while acting within the scope of their authority and while about their master's business, spoke of and to the plaintiff the slanderous words alleged in the declaration, then they should find for the plaintiff and assess his damages, etc. *Ib.*

6. *Instructions. Refusal.*

The error complained of, if error in fact there is, in appellee's first instruction, set out in dissenting opinion, was cured by the granting of appellant's fifth instruction set out in the facts in this case. *Railroad v. Walls*, 256.

7. *Master and servant. Injury. Question for jury.*

In an action by a servant for injury in repairing machinery where there is a sharp conflict in the evidence as to whether plaintiff followed or disobeyed instructions the case should go to the jury. *Lumber Co. v. Bontall*, 332.

8. *Criminal law. Examination of witnesses. Absence of accused.*

The examination of a witness in the absence of the defendant charged with a capital felony is reversible error. *Watkins v. State*, 438.

9. *Same.*

If it be conceded that section 1495, Code 1906, providing that in criminal cases the presence of the prisoner may be waived, is applicable to capital felonies, still it does not apply where the defendant did not know that a witness was going to be examined while he was out and his counsel were not aware of his absence from the court room. *Ib.*

10. *Embezzlement. Proof of conversion. Necessity.*

Where defendant was charged with embezzlement, in that he collected as agent from another a premium on an insurance policy and converted the same to his own use. Where there was no evidence showing or tending to show that the money was, by the defendant, converted to his own use, he should be acquitted. *Bell v. State*, 430.

11. *New Trial. Grounds. Newly discovered evidence.*

Where a judgment was rendered against a railroad company for the conversion of a shipment of cattle, and defendant made a motion for a new trial on the ground that since the rendition of the judgment, it had discovered that the cattle which plaintiff claimed to have shipped over its road, were sold by him to another party prior to the date of the shipment and defendant showed due diligence in discovering such evidence, a new trial should have been granted. *Southern Ry. Co. v. Elder*, 461.

TRUSTS AND TRUSTEES.

TRIAL—Continued.

12. *Action for deposit. Applicability to evidence.*

When a depositor sued a bank claiming that it improperly charged his account with a forged check, and the bank claimed that the check was genuine, an instruction that there could be no recovery if the depositor did not promptly notify the bank of the forgery, so that it might recover against its correspondent, was not warranted by the evidence where the depositor promptly notified the bank and assisted one of its officers in attempting to trace down the forgery, and especially since the bank contended that the check was signed by the depositor. *Collins v. Union & Farmers' Bank*, 506.

13. *Criminal law. Rebuttal.*

In a trial for murder where a witness testified to a statement made to him by another witness in a doctor's office when the doctor was not present, it was not permissible to allow the doctor to testify what the other witnesses told him about the killing since such testimony was not in rebuttal. *Cumberland v. State*, 521.

14. *Direction of verdict. When proper.*

Where plaintiff proved a good cause of action by the testimony he offered and there was a conflict in the evidence offered by the plaintiff and defendant, the cause should have gone to the jury, and the trial judge was in error in granting a peremptory instruction for the defendant. *Jones v. Knotts*, 590.

See INSTRUCTIONS.

TRUSTS AND TRUSTEES.

1. *Bank of banking. Collection of drafts. Trust. Insolvency.*

Code 1906, section 4852, providing that a bank or other person collecting a draft with a bill of lading attached shall retain the money so collected for the space of ninety-six hours after the delivery of the bill of lading, is intended merely to give the debtor or consignee sufficient time to investigate his purchase and if dissatisfied, to sue by attachment in the local courts, and in such case a bank collecting for the owner's drafts with bill of lading attached does not hold the money collected in trust so that a trust may, on the insolvency of the collecting bank be impressed upon its assets, but the owner of the drafts is a mere general creditor. *Nat. Bank v. Conner*, 653.

2. *Taxation. Personal property. To whom assessable.*

Personal property belonging to an estate held in trust, should be assessed to the trustee in his representative capacity at his residence or domicile. *Adams v. Dale*, 671.

U. S. CONSTITUTION—VENDOR AND PURCHASER.

U. S. CONSTITUTION CITED AND CONSTRUED.

- § 8. Commerce. Interstate Commerce. Burden upon. *M. & C. R. Co. v. State*, 290.

USURY.

Rights and remedies of third persons. Application of payments.

A junior mortgagee is entitled to have the senior mortgagee's debt purged of usury, and where personal property covered by both mortgagees has been delivered to the senior mortgagee without public sale, he must take it at its market value. *Wilczinski v. Smith*, 251.

VAGRANCY.

Sentences. Excessive sentence.

A defendant convicted of vagrancy under Code 1906, section 5058, which provides that a party convicted of vagrancy shall be committed to jail for not less than ten nor more than forty days and shall not be liberated from such sentence by payment for the time to be served, unless such person gives bond with sufficient security for future industry and good conduct for one year from the date of the bond, cannot be required to give bond to keep the peace for two years, and such a provision will render the whole judgment excessive and unlawful. *Daniels v. State*, 440.

VENDOR AND PURCHASER.

1. *Innocent purchasers. Notice. Adverse possession. Lost deed. Acts of ownership. Presumption. Quietting title. Evidence. Claim against state. Void tax deed. Taxation.*

In a suit in equity to confirm title to land claimed by plaintiffs where the defendants claimed title to the land by adverse possession and plaintiffs claimed to be innocent purchasers for value without notice, the fact that such lands were indicated on an official county map as owned by defendants and the sectional index used by the county reflected all the conveyances affecting these lands and showed numerous deeds executed by defendant and his grantors from time to time and the fact that the property had been for a long time assessed to and the taxes paid by defendants, were sufficient to charge plaintiffs with notice of defendant's claim to the land. *Hewling v. Blake*, 225.

2. *Bona-fide purchaser. Notice. Record of deeds.*

Purchasers of the land were charged with notice of the title of parties claiming under a prior deed which had been recorded although the record of such deed had been destroyed by fire and not again recorded. *Myers v. Viverett*, 335.

VENDOR AND PURCHASER.

VENDOR AND PURCHASER—Continued.

3. *Bona-fide purchaser. Notice. Records destroyed by fire.*

Code 1906, section 3185, first enacted in 1892 providing that a lost, stolen or destroyed record shall not constitute constructive notice longer than three years from the time that chapter became operative, or from the loss, theft, or destruction, unless within that time the instrument shall again be placed of record or proceedings be begun to perfect the record, has no retrospective effect. Its clear meaning is: 1st, that a record which has been lost, stolen or destroyed prior to the time the statute became operative shall not constitute constructive notice longer than three years from such time, unless within that time the instrument shall again be placed on the record, or proceedings be begun to perfect the record and, 2nd, that a record lost, stolen or destroyed after the statute became operative shall not constitute constructive notice longer than three years from the time of the loss, theft or destruction thereof, unless within that time the instrument shall again be placed on the record or proceedings be begun to perfect the record. *Ib.*

4. *Vendor's lien notes. Maturity. Action.*

The wife, a copayee with her husband of defendant's lien notes which had not matured when she filed a bill to enjoin the maker as garnishee, from payment to a judgment creditor of her husband, had no right to an attorney's fee provided by the purchase money notes. *Russell v. Allen*, 722.

5. *Bona-fide purchaser. Notice of parol reservation. Fixtures. What constitutes. Statute of frauds.*

Where the owner sold a lot a portion of which was occupied by a store house extending a distance of nine feet over the lot with a parol reservation of the right to remove the house, a subsequent purchaser of the lot without notice of the reservation could maintain an action for trespass against the original owner for removing the house over his protest. *McLeod v. Clark*, 861.

6. *Contracts. Constitution. Term of payment. Waiver. Mortgages. Vendor's lien. Priority.*

Where complainant through her agent and attorney entered into a written contract for the sale of lands, agreeing in consideration of two hundred dollars to be paid in Jackson, Mississippi, free from any exchange and the further consideration of one thousand dollars, to be paid in cash at Jackson free of any exchange, to convey the defendant a specified tract of land, and the contract provided that it should be sent to a bank and delivered to defendant when the first cash payment was sent to complainant at Jackson free of exchange, the deed to be made upon the same

 VENUE.

VENDOR AND PURCHASER—Continued.

condition. New York Exchange or the first payment was sent to complainant and collected by her in the usual course of business and the contract delivered to the bank. Thereafter defendant borrowed from another a sum of money to make the last payment and gave a deed of trust on the land to secure the money, which money was deposited in a bank at the place where the deed was to be delivered, and that bank drew a draft on New York, which was delivered to complainant's agent, who sent it to complainant's agent at Jackson, but the draft was not paid because of the insolvency of the drawing bank. In such case under the terms of the contract, payment in cash at Jackson had to be made before defendant was entitled to a deed. *Mayes v. Coleman*, 874.

 7. *Terms of payment. Waiver.*

In such case, the fact that complainant had previously accepted and collected New York Exchange for the first payment, and that her agent received a New York draft, did not show a waiver of her right to demand payment in cash at the place agreed upon, since it is a well settled and universally recognized rule that, when a debtor has given his check for the amount of his indebtedness, the *prima facie* presumption arises that the check was taken merely as a conditional, not absolute, payment, and in case the check is not honored upon due presentation, the original indebtedness for which it was given continues to exist, and recovery may be had by the creditor without resorting to the debtor's liability on the check. *Id.*

VENUE.

 1. *Criminal law. Appeal. Judicial notice.*

On an appeal to the circuit court from a conviction of a misdemeanor by a justice of the peace, it is necessary for the state to show the venue of the offense, and where the only proof of venue was that the offense occurred within a named city it was insufficient, since the court cannot take judicial notice of what justice's court district a named city is in. The districts of a county being determined by order of the board of supervisors of the county, and by such order may be and are sometimes charged. *Elzey v. State*, 502.

 2. *Execution. Claims by third person. Statutory provisions.*

The provisions of Code 1906, section 4998, that the venue of the trial of a claimant's issue may be changed on claimant's applications to the county of his residence, makes it optional with the claimant as to whether or not the claimant's issue will be tried in the county from which the execution is issued,

VERDICT—WHARVES.

VENUE—Continued.

or the county in which the property levied upon is situated and the claimant lives, and in such case if the claimant applies for a change of venue to the county in which he lives and the property is situated, the statute is mandatory and the change of venue must be granted. *Oroom v. Williams*, 605.

3. Criminal law. Change of venire. Local prejudice.

When the atmosphere in a county was not such as would insure a fair trial to a person charged with murder he had a right of a change of venue, especially when the sheriff and the circuit clerk who took part in the selection of the venire were kinsmen of the deceased, and a majority of the names put into the jury box were persons residing in the supervisor's district where the homicide occurred, and where after, the venire was quashed on defendant's motion, a new venire was ordered and the sheriff proceeded to summon fifty-five of the same men, thereby compelling defendant to select a jury from the very men he had rejected to their knowledge. *Eddins v. State*, 780.

VERDICT.

1. Trial. Sufficiency.

In a suit against two defendants, a verdict that "we the jury, find for the plaintiff and assess his damages at five hundred dollars," was sufficiently definite. *Callahan v. Rayburn*, 107.

2. Replevin. Form. Restoration of property. Statutes.

Under Code 1906, section 4233, which provides that the judgment for plaintiff in replevin, where defendant gives bond, shall be for the restoration of the property, with damages, a judgment against defendant and the sureties on his bond for damages only is erroneous. *Miller v. Griffin*, 535.

3. Trial. Direction of verdict. When proper.

Where plaintiff proved a good cause of action by the testimony he offered and there was a conflict in the evidence offered by the plaintiff and defendant, the cause should have gone to the jury and the trial judge was in error in granting a peremptory instruction for the defendant. *Jones v. Knotts*, 590.

4. Homicide. Manslaughter. Evidence.

In such a case a verdict of manslaughter pursuant to such instructions, not being supported by the evidence, was error. *Rester v. State*, 689.

WHARVES.

1. Discrimination in use.

When a railroad built a wharf at its terminal at the foot of a public street under a charter given by the city such a wharf was

WATER AND WATER COURSES—WILLS

WHARVES—Continued.

private property, and it was not discrimination to lease a portion of the wharf to one ship broker for storage of parcel freight, to the exclusion of another ship broker, the other portion of the wharf being used for general merchandise, and all being given equal terms and rates, and adequate facilities for receiving being provided for at such wharf. *Gulf & S. I. R. Co. v. Buddendorf*, 752.

2. *Same.*

In view of the fact that the railroad company had the right to carry on this business in the manner in which it was carried on through its own servants, it likewise had the right to carry on the same business in the same way through the agency of another. *Id.*

WATER AND WATER COURSES.

Flowage. Construction of railroads.

It is the duty of railroad companies not only to properly construct, but properly to maintain, their roadbeds with sufficient openings to permit the flow of surface water and where a railroad company originally constructed its roadbed with a long trestle under which the surface waters followed their natural flow, but in the course of time gravel and other debris from the tracks washed under the trestle so as to form an obstruction, thus preventing the flow of surface water and inundating the adjacent lands, the company was liable. *Railroad Co. v. Scott*, 443.

WILLS.

1. *Executors and administrators. Settlement of estate. Parties aggrieved.*

Where an infant beneficiary under a will received her share of the estate, and neither she nor any one acting for her complained, another beneficiary had no right to complain, the course of the procedure not defeating the purpose of the will. *Fidelity & Guaranty Co., v. State*, 16.

2. *Construction. Powers of executor and court.*

Under a will directing the executor to continue the testator's business for not more than three years, during which time he shall liquidate the business, only buying such goods as may be necessary for the purpose, and declaring that if during the three years the executors or heirs shall think it best that the business shall cease, the executors or heirs may petition the court and it may determine the manner of disposing of the business, the court was au-

WILLS.

WILLS—Continued.

thorized in its discretion to order the executor, who was unable to sell the business at public auction, to sell the same to one of the beneficiaries for herself and as guardian for an infant beneficiary. *Ib.*

3. *Deeds. Life estate. Adverse possession under life tenant. Vender and purchaser. Bona-fide purchaser. Notice. Record destroyed by fire. Estoppel. Failure to assert title. Ejectment. Common source of title.*

Where plaintiff's father and mother executed an instrument providing that in consideration of five dollars, and parental affection which the first parties had towards the second parties, they thereby granted, gave, bargained and sold to the second parties the lands therein described, to have and to hold as joint owners thereof in fee simple, that the first parties for themselves, their heirs covenanted and agreed to defend and warrant the title to the second parties, but that it was understood and agreed that the first parties were to hold possession and exercise control and ownership over such lands during their natural lives, and that at their death the second parties were to be the sole owners thereof with personal property of which they might die seized and possessed. Such an instrument in so far as the land conveyed was not a will but a deed with the reservation of a life estate to the grantors. *Myers v. Viverett*, 334.

4. *Construction. Power of testamentary disposition. Executory devise.*

When a testator by will gave all of his property to his wife, with full power to mortgage or sell it and to give perfect title thereto, and providing that after her death the residue should be divided equally among his children. In such case the wife has the use and enjoyment of the property during her lifetime, with full power to mortgage or sell it and in the event it or any portion thereof should not be sold by her, it should be divided after her death equally among his children. *Sellg v. Trost*, 584.

5. *Construction. Executory devise.*

Such a will must be construed as a whole, but if it were permissible to construe the two classes of it separately, and if by so doing to hold the first to be a devise in fee, the limitation over contained in the second clause would be void as an executory devise. *Ib.*

6. *Constructions. Interest devised. Money on hand.*

When a testator after making specific bequest, devised all the residue of his property to his wife and provided that in case he should have more than three thousand dollars in money on hand at the time of his death two bequests of one thousand dollars

WILLS—Continued.

each should be paid, otherwise all money on hand should pass to his wife, a demand note to which was attached an agreement that it should not be paid until the end of the season, was not money on hand and where the testator in such case did not have on deposit or in his possession more than three thousand dollars at the time of his death, the conditional bequest will fail and his wife will take all. *Thrasher v. Humphreys*, 735.

7. *Construction. Interest devised. Removal of property.*

Where a testatrix bequeathed to her niece the sum of five hundred dollars per annum until she becomes twenty-one years old, and directs that her executor invest the same each year for her at interest in dividend bearing property and that the principal with all accumulated interest and dividends thereon, be paid over to her when she reaches her majority, but should she die before reaching her majority, then and in that event said bequest with accumulated interest thereon shall descend to her heirs at law, such a will evidenced no intention on the part of the testatrix that the interest bequeathed to the said niece should be used for her support or that she should have any right therein until she reached her majority. *Sulwvan v. Gelsenberger*, 775.

8. *Same.*

Under such a will the minor's guardian was not entitled to remove the property out of the state into the state of the minor's residence, although the rule is generally that the *situs* of a minor's estate is fixed by its domicile. *Ib.*

9. *Construction. Estate conveyed. Intent of testator. Life estate. Rights of remaindermen.*

The cardinal rule of construing a will and the dominant purpose of courts should ever be to discover the testator's intentions and when it is discovered, it should be given effect. *Rives v. Burrage*, 789.

10. *Construction. Estates conveyed. Life estate.*

Under a testator's will which gave his wife all his property for her natural life, with remainder to his children, and provided by a codicil that at his death, she shall hold and enjoy all his property, not for life merely, but absolutely as her own property, with full power to dispose thereof and further providing that property as to which she should not exercise the power should go to her children in remainder. In such case the wife took merely a life estate in the property she did not consume or otherwise dispose of during her life, the codicil being added merely for making clear the power of his wife to convey an indefeasible title to the property should she think it advisable to dispose of it during her life. *Ib.*

WILLS—Continued.

• 11. *Estate created. Right of remaindermen.*

Where a testator left his property to his wife for life with full power of disposition during her life, she could not defeat the right of the remaindermen by selling the devised property and investing the proceeds in other property, whether intentionally or through misinterpretation of the will. *Ib.*

12. *Validity. Holographic. Wills. Incorporation.*

Under Code 1906, section 5078, so providing, a will to be valid, must be wholly written and subscribed by the testator, or attested by two witnesses in his presence. A letter directing the disposition the testatrix wished made of her property after her death, in the event she should not make another and more formal will, wholly written and subscribed by the testator, was properly admitted to probate as a part of her last will and testament. *Hewes v. Hewes*, 826.

13. *Incorporation of extrinsic documents into will.*

Where an extrinsic document is incorporated into a will by a reference thereto in the will, it becomes a part and parcel thereof; and since a will not attested by witnesses must be "wholly written" by the testator himself, it necessarily follows that for an extrinsic document to be incorporated into and thereby become a part and parcel of a will valid only if "wholly written" by the testator himself, such document must also be so written; for should it not be, the whole will would not be in the handwriting of the testator. *Ib.*

WITNESS.

Examination. Cross-examination.

A defendant has a right during the trial to withdraw his plea of the statute of limitations by so stating when upon the witness stand, however this is a personal right which may be exercised voluntarily by a defendant, and until exercised it is presumed that he wished to claim the advantage of this plea, and plaintiff has no right upon cross-examination to attempt to persuade him to withdraw it. *Holmes Bros. v. Deer*, 651.

WORDS AND PHRASES.

Capacity of parties. "Paranoia."

"Paranoia" is a form of mental distress known as delusionary insanity, and a person affected with it has delusions which dominate but do not destroy, the mental capacity, and though sane as to other subjects, as to the delusion and its direct consequences the person is insane. *Mounger v. Gandy*, 133.

E. J. H.

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